Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DONNA SAXONIS,

PETITIONER(S)

V.

LYNN TEACHERS UNION LOCAL 1037, ET AL.,

RESPONDENT(S)

ON PEITION FOR WRIT OF CERTIORARI TO THE
APPEALS COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

LESTER E. RIORDAN III
COUNSEL OF RECORD
12 POND LANE,
SUITE EB-1N
CONCORD, MA 01742
BBO# 633725
1-978-341-0404

QUESTIONS PRESENTED

A public school substitute teacher on a long term assignment qualified for the protections and benefits of a collective bargaining agreement (CBA). The teacher was discharged without cause and almost immediately rehired for the purpose of impairing her ability to accrue seniority rights. The union did not disclose the grievance, failed to advise the teacher of her options and declined to present the grievance. A state appeals court held that the teacher was entitled to a trial against the school for reliance damages, but prohibited her from pursuing her claim against the union. In such circumstances:

1. Can a state court prohibit a jury trial against a union, in derogation of the 7th and 14th amendments of the Constitution, where it finds a justiciable claim against the employer and where the union took no steps to advise or represent the teacher and claimed that it did not owe a duty of fair representation despite the teacher's status as a member of the collective bargaining unit?
2. Does an appellate court judgment violate the 5,th 7th and 14th amendments of the Constitution, where it holds that a claim for breach of the duty of fair representation (a) is barred by the statute of limitations; and (b) is barred on the finding that the teacher will be unable to establish bad faith; where the issues were not presented to the trial court; there are facts in dispute; the court has ruled that the claim is, in part, justiciable and the plaintiffs were not provided with adequate notice of the need to present evidence on the issue.
3. Can a union representing public school teachers, in derogation of the 5th and 14th amendments of the Constitution, deprive a substitute teacher of meaningful access to the grievance process where the duty of fair representation is guaranteed by state statute and treated by the highest court of the state as a right to due process and/or equal protection under the U.S. Constitution?
4. Does a public school deprive a non-tenured teacher of a vested property interest, in derogation of the 5th and 14th amendments of the Constitution, where it discharges her contrary to an express agreement and the terms of the CBA?

LIST OF PARTIES

PLAINTIFFS

Donna Saxonis*
Paul Saxonis*

DEFENDANTS

The City Of Lynn
Patrick J. McManus, Mayor
Lynn Public Schools
Dr. James Mazareas
Dr. James T. Leonard
Edward B. Johns
Patricia M. Libby,
Bartley J. Conlon
Albert G. Malagrifa
Evelyn G. Lazaris *
Lorraine A. Lebrun*
Joseph O'Hagan
Joseph G. Gauvain
The Lynn Teachers Union Local 1037
American Federation of Teachers
AFL-CIO
The Lynn School Committee Members:
Judith A. Flanagan Kennedy
Frank M. Carrabba
Stephen J. Duffy
William F. McGuthness
George K. Mazareas
William M. McDonald
Timothy McManus
Patricia M. Capano
Donna M. Coppola
Madelyn Day Barry
Loretta Cuffe-O'Donnell
Carolyn A. Murray
*Non-parties. All other individuals are parties due to their representative capacity with the exception of Defendant Malagrifa

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

LIST OF THE PARTIES. ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW. 1

JURISDICITON. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS. 1

STATEMENT OF THE CASE. 2

THE CASE IN A NUTSHELL. 2

THE DETAILS. 4

ARGUMENT: REASONS FOR GRANTING THE WRIT. 12

CONCLUSION. 19

APPENDIX. AP.1

TABLE OF AUTHORITIES

Cases

Baker v. Local 2977, State Council 93, American Federation of State, County and Municipal Employees Et Al., 25 Mass.App.Ct. 439, 442 N.14 (1987). 16

Bishop v. Wood, 426 U.S. 341, 344 (1976). 18

Brophy v. School Committee of Worcester, 6 Mass.App.Ct. 537,C731, 734 (1978). 18

Carbone v. School Comm. of Medford, 12 Mass.App.Ct. 948 (1981). 16

Cappellano v. Massachusetts Bay Transp. Auth., 38 Mass. App. Ct. 231, 235, 646 N.E.2d 769 (1995). 13

Carnig v. Carr, 167 Mass. 544 (1987). 19

Celotex v. Catrett, 477 U.S. 317, 326 (1986), 167 Mass. 544 (1987). 13

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 573 (1990). 14

City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641, 657 (10th Cir. 1992). 15

De Arroyo v. Sindicato De Trabajadores Packinghouse, Afl-Cio, 425 F.2d 281 (1st Cir.) (1970). 15

Dewey v. Clark, 180 F.2d 766 (1950). 15

Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902). 14, 15

Graham v. Quincy Food Service Employees Ass'n, 407 Mass. 601, 606-607, 609,, 612-614, 555 N.E.2d 543 (1990). 13, 15

Harrison v. United Transportation Union, 530 F.2d 558, 561, 563(4th Cir. 1975). 15, 16

Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8, 11-12 (1988). 19

Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 341, 347-348 (1987). . 12, 17

Miline v. School Committee of Manchester, 381 Mass. 581, 582 N.2, 583 (1980). 18

National Ass'n of Gov't Employees v. Labor Relations Comm'n., 38 Mass. App. Ct. 611, 613, 650 N.E.2d 101. 13

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). 15

Saxonis et al. v. Lynn Teachers Union Local 1037 et al., 62 Mass. App. Ct. 916; 817 N.E. 2d 793 (2004). 1

Saxonis et al. v. Lynn Teachers Union Local 1037 et al, 443 Mass. 1104; 822 N.E. 2d 304 (2004). 1

Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291 (1st Cir. 1978). 15

Steele v. Louisville N.R.R., 323 U.S. 192, 198-199 (1944). . . . 12, 17

Vaca v. Sipes, 386 U.S. 171, 182 (1976). 12, 17

Constitutional Provisions And Statutes

28 U.S.C. § 1257(A). 1

United States Consitiution

U.S. Const., Amend. V. 1, 13, 18

U.S. Const., Amend. VII. 1, 14, 15

U.S. Const., Amend. XIV. 1, 13

Massachusetts General Laws

Mass. Gen. L. ch. 71, § 41. 1

Mass. Gen. L. ch. 71, § 42. 1

Mass. Gen. L. ch. 150e, § 10 (B)(3). 1

Mass. Gen. L. ch. 150e, § 5. 1

OPINIONS BELOW

On May 20, 2002, the Superior Court, Essex County, Massachusetts, entered Summary Judgment in favor of the Union Defendants. The docket entry is reprinted in the Appendix at AP. 1. The Memorandum of Decision is unreported and reprinted in the Appendix at AP. 2. The Superior Court denied Plaintiffs' motion for reconsideration. This order is unreported and reprinted in the Appendix at AP. 19-20.

On June 12, 2002, On May 20, 2002, the Superior Court, Essex County, Massachusetts, entered Summary Judgment in favor of the remaining Defendants. The docket entry is reprinted in the Appendix at AP. 8, 21. The Memorandum of Decision is unreported and reprinted in the Appendix at AP. 9.

The opinion of the Massachusetts Appeals Court, reported at 62 Mass. App. Ct. 916; 817 N.E. 2d 793 (2004), is reprinted in the Appendix at AP. 23.

The Massachusetts Supreme Judicial Court denied Further Appellate Review. The order, issued without opinion, was reported at 443 Mass. 1104; 822 N.E. 2d 304 (2004), and is reprinted in the Appendix at AP. 29.

JURISDICTION

The Judgment of the Massachusetts Appeals Court was entered on November 8, 2004. A timely petition for Further Appellate Review was filed with the Supreme Judicial Court on November 29, 2004, and was denied on February 2, 2005. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves: Amendments V; VII and XIV of the Constitution of the United States; and Massachusetts General Laws, Chapter 71, §§ 41 and 42; and Chapter 150E, §§ 5 and 10. The pertinent provisions thereof are set forth in full in the Appendix to this petition.

STATEMENT OF THE CASE

The Case in a Nutshell

Donna Saxonis ran her own beauty parlor, but for years she dreamed of being a teacher. When her children grew up and left home, she decided to pursue teaching as a second career. Donna Saxonis went back to school. She earned her teaching certification in cosmetology. She took substitute teaching assignments whenever she could.

In 1996, the vocational institute in her city had a problem. A cosmetology teacher who planned to retire in June of 1997 couldn't return to work due to illness. A day to day substitute would not suffice. The school principal needed a certified long-term substitute teacher to take over immediately. But the principal had another problem. If a long-term substitute stayed for the whole year, that teacher would earn seniority under the collective bargaining agreement. The principal didn't want that.

The department head, at the behest of the principal, contacted Donna Saxonis. She offered her the position. Donna told the department head that if she took the position she would have to close down her business. The department head told Donna that she was in line for the permanent position. The principal reinforced this. In fact, Donna was given paperwork to fill out for the full time position and asked to take a physical.

There was a collective bargaining agreement (CBA) between the school and the teachers' union. Long term substitutes like Donna became members of the collective bargaining unit after twenty consecutive days of service. Donna didn't miss a day. She joined the union. She thought she was on her way. The CBA offers especially important protections to long term substitutes. They receive regular teachers pay and accrue seniority and even tenure just like full-time teachers. They are entitled to due process rights relating to terminations. The CBA protects them in their position over non-bargaining unit members. This is understandable. Not only is the availability of these teachers important to the school, but certified long-term substitutes provide a pool of future teachers.

Donna Saxonis didn't know anything about these things. Donna Saxonis didn't understand the implications of seniority or due process. She never read a collective bargaining agreement. The

union would take care of that. Donna Saxonis didn't even know that the agreement, if properly enforced, would protect her job. The principal wanted her. She was in line for the permanent position. Why should she be concerned?

Donna Saxonis was terminated. The principal, he said, wanted to ensure that he had a chance to observe all qualified candidates for the new position. He wanted to rotate long term substitutes into the position every thirty days. He understood that Donna Saxonis was promised the position for the rest of the year. He knew that she had closed down her business. It was a minor set back. There was no need to worry. Donna was in line for the position.

A day to day substitute teacher without any experience was given the job. She was not certified. She was not a member of the bargaining unit. The Appeals Court even conceded the obvious by nothing that the "placement of an unlicensed and uncertified teacher as a long term substitute was likely improper."

The new substitute was discharged. The principal asked Donna to come back for the rest of the school year. The rotation system died after a short life.

Donna Saxonis did not understand that her earlier discharge made it impossible for her to earn seniority status. But the principal knew it and so did the union. They had a meeting about it, in fact. At the end of that meeting, the union and principal agreed that long-term substitutes will not be removed to prevent an employee from achieving seniority or other benefit status. AP.113.

The union knew that Donna Saxonis was improperly removed and that her seniority was impaired. The union did not inform her of the grievance. They did not advise her. They did not investigate.

The original teacher, on sick leave since December 1996, made an unexpected recovery. She returned on May 12, 1997. Donna Saxonis' last day at work was May 9, 1997. It is undisputed that if Mrs. Saxonis had not been improperly removed earlier, she would have achieved seniority status.

Donna Saxonis did not get the job. In August 1997, she and her husband met with the union president. They spoke with him at length and gave him a letter recounting all the facts. The union president said nothing about the impropriety of the earlier discharge. He said noting about the seniority issue. He offered no advice. He

said there was nothing he could do. During the litigation, the union took the position that it did not owe Donna Saxonis a duty because she was a substitute. Later, the union claimed that it had no duty because, at the time of this meeting, Donna Saxonis was no longer a member of the collective bargaining unit.

Donna Saxonis attempted to contact the members of the school committee to discuss this matter to no avail. She attempted to contact the principal without success. She met for an hour with the school superintendent. The superintendent does not recall the meeting.

Donna Saxonis testified to these facts. However, she was not alone. Her department head verified Donna's allegations by affidavit.

The Details

The Lynn Teachers Union Local 1037 is the collective bargaining representative for public school teachers serving in the city of Lynn, Massachusetts, including teachers at the Lynn Vocational Technical Institute (hereinafter ("LVTI"). This suit was filed in the Massachusetts Superior Court for Essex County by Donna and Paul Saxonis, against the respondent Joseph G. Gauvain as the representative officer of the union.[1] The City of Lynn or the Lynn school system refers to the remaining defendants.

The complaint, drafted *pro se,* stated a variety of claims.[2] This petition limits its focus to Counts I through III.[3] Paul Saxonis continued to litigate the matter pro se though discovery. He did not seek written discovery but conducted a number of depositions. Mr.

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[1] At the time the suit was filed, Joseph G. Gauvain was president of Local 1037. The national unions were also named as parties.

[2] Paul Saxonis drafted the complaint and conducted the litigation for his wife. Most of the individual defendants were sued in their representative capacity. With the exception of the unions, the City of Lynn and Defendant Malagrifa, defendants named in their individual capacity are no longer part of the suit.

[3] Count III states a claim for conspiracy. The only direct evidence relates to the letter documenting a meeting between these parties where the issue of termination of substitutes to impair seniority rights was raised. While petitioners do not expressly waive this issue, argument is confined to Counts I and II.

Saxonis litigated the union's motion for summary judgment. On the day his opposition to the City of Lynn's motion was due, he procured counsel to assist him. His new counsel procured an additional week to respond to the City's summary judgment motion. The union, which did not agree to a supplement of the opposition to their summary judgment motion, agreed to a continuance of the hearing.

Count I of the complaint states an action captioned as Breach of Employment Contract. AP. 40. This count, which contains 36 separate allegations, expressly pleads both the city and the union. This aspect of the complaint contained different theories of recovery against the two distinct groups of parties. Relative to the union, the complaint expressly alleges the breach of the duty of fair representation. A. 40-46 (Complaint at ¶ 214). The complaint also expressly pled Mrs. Saxonis' status as a union member. Id. at ¶ 205.

While Mr. Saxonis did not cite to constitutional provisions, he expressly pled the violation of constitutional rights. Id. at ¶¶ 29, 190, 220. Central to this claim and also expressly pled, Mr. Saxonis focused a great deal of his complaint based on the denial of due process, AP. 50, 64, 71, 77. Throughout his papers during the course of litigation, Mr. Saxonis continued to expressly raise the issue of a breach of constitutional rights based on lack of due process and the inability to pursue a claim based on the union's breach of its duty of fair representation. AP. 50, 55, 62, 64, 696, 71, 77, 78. These papers, while in-artfully pled, highlight Mr. Saxonis' focus on the constitutional implications of the case.

Count II of the complaint states an action captioned as Wrongful/Unlawful Termination. This count, while primarily directed to the City of Lynn, states that the defendants, including the union, took no action to "manage, prevent or correct" the City of Lynn's termination of Donna Saxonis. Id. at ¶ 221 and 225.

A fair reading of these two counts shows that the plaintiffs attempted to state causes of action against the union for breach of the duty of fair representation sounding in both contract and tort. Likewise, these counts expressed both contract and tort theories of recovery against the City of Lynn.

Donna Saxonis, via affidavit, verified her allegations. In addition, Mrs. Saxonis procured an affidavit from her supervisor which corroborates her claims.[4]

The facts, as set forth in the complaint and related materials, indicate as follows: Donna Saxonis is a certified teaching cosmetologist with three decades of experience. See AP. 115 et seq. In pursuit of a second career as a teacher, she went back to school, obtained her certification and began extensive service as a substitute teacher in the Lynn School System. See Id. Substitute teaching provides an important and traditional entry into a career position.

In December 1996, after being asked to work as a substitute for Defendant Lazaris on short notice, Donna Saxonis was asked by her department head to take a long-term teaching position at Lynn Vocational Technical Institute (hereinafter ("LVTI"). (Emphasis added.) AP. 115 et seq. The long-term nature of the assignment mandated state certification. AP. 101 et seq. The position resulted from a vacancy created by the departure of Defendant Lazaris. e.g. Id. Ms. Lazaris was placed on indefinite leave. Id.

The City of Lynn expected that Mrs. Saxonis would close down her full-time beauty salon to take this position. A.101, 115. The department head, Ms. Jacqueline Whyte, indicated that it was clear from her offer that Ms. Saxonis could not accept the position without closing her full-time salon. Id. Ms. Whyte added that, "Malagrifa was aware that Donna was closing her business and that it would be impossible for her to accept the position and still maintain the business." Id.[5] "[E]ach and every action [she] took relative to the hiring, dismissal and rehiring of Donna Saxonis... was approved by or ordered by Defendant Malagrifa." Id.

Ms. Whyte specifically told Donna Saxonis that the position was for the remainder of the school year and as a long-term

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[4] The supervisor's facsimile affidavit was submitted on the day of the hearing with additional factual exhibits. The original signature was filed a week later. Mr. Saxonis also submitted additional exhibits at hearing. The trial court did not expressly admit or strike these papers. However, the court's memorandum on summary judgment cites to some of these papers. See A. 3 referring to the CBA.

[5] Ms. Whyte's affidavit is consistent with and supportive of Donna Saxonis' affidavit. Compare AP. 101 with AP. 115.

substitute. Id., AP.101. Defendant Malagrifa approved this offer. Id. As to long-term status, Ms. Whyte stated that she issued to Mrs. Saxonis a "teacher's day planner and attendance book." Id. Ms. Whyte added that "[t]he planner is issued only to long-term employees..." and that she was "unaware of any situation where a day to day substitute was issued a planner." Id.

The City of Lynn acknowledged that Donna Saxonis alleged that she was "hired to serve as a substitute teacher for Defendant Lazaris for the remainder of the academic school year." In addition to Ms. Whyte's testimony, Mrs. Saxonis affirmed this allegation, based on personal knowledge, via her affidavit. A. 115.

Donna Saxonis continued in her assignment without incident or interruption until February 14, 1997. Id. Three weeks short of earning her seniority rights, Donna Saxonis was summarily terminated and replaced by Ms. Ann Fountain. Id. The termination occurred without advance written notice as required by the Collective Bargaining Agreement.

Ms. Fountain, a high school graduate, was uncertified and unqualified to take the position. Defendant Malagrifa asserted that he was instituting a thirty (30) day rotation system to assess candidates to fill Defendant Lazaris' position for the coming school year. Id. Ms. Fountain's hiring supports the allegation that the rotation system constituted a mere pre-text to impair Donna Saxonis' seniority. Clearly, Ms. Fountain was not eligible for the full-time position based upon her credentials. Id. and at 101 et seq. Further, Defendant Malagrifa was aware that Ms. Fountain was not qualified. The rotation system was abandoned after Ms. Fountain's departure. Id.

Donna Saxonis was rehired. Id. Mrs. Saxonis was assured that this time the position was "until the end of the year." Id. In fact, Mrs. Saxonis was hired as a long-term substitute on the first day of her return. Id. Mrs. Saxonis remained in the position until May 9, 1997, at which time she was again summarily dismissed, once again without notice. Id.

There is no dispute, and the trial court implicitly found, that Donna Saxonis served as a substitute teacher for at least thirty-seven consecutive school days. See AP. 83-85. As a result, Donna Saxonis became a "substitute teacher on a long-term assignment," within the meaning of the Collective Bargaining Agreement (hereinafter

"Contract"), on either December 5, 1996, or January 15, 1997. See Id.

After Mrs. Saxonis filed her lawsuit, Malagrifa concocted a pre-textual claim that Ms. Fountain left under duress that was caused by Donna Saxonis' alleged harassment. The Defendants have not provided a shred of credible evidence to establish this outrageous and malicious claim. This contention is directly rebutted by Ms. Whyte's affidavit which states that not only was she completely unaware of this allegation, but that Malagrifa would not have re-hired Donna Saxonis had she engaged in such conduct. A. 101.

When Malagrifa was asked at his deposition why he rehired Mrs. Saxonis he simply responded, "Do you discipline your child for being a bad kid and then praise them the next day for being a good kid?" As to Ms. Fountain, it is of some interest and quite curious that the only document available in her file is a payroll card. There are no applications on file, no certifications or resumes, no employment physical.

The allegation that Malagrifa engineered the destruction of Donna Saxonis' seniority in this manner is not merely documented by Ms. Whyte's affidavit, but was actually memorialized by the Union. See discussion *infra*. The Union concealed this from Mrs. Saxonis until Mr. St. Pierre, a union official, disclosed the information in January 1998. A meeting occurred between Union officials and Defendant Malagrifa regarding an unidentified grievance on April 30, 1997. AP.113. This meeting, memorialized in a letter from Gauvain to Malagrifa, May 1, 1997, states: "Long-term substitutes will not be removed from their assignments to solely reduce the cost to the system. Nor will they be removed to prevent an employee from achieving seniority or other benefit status." Id.

In addition, Donna Saxonis was led to believe that she had received a conditional offer of employment. A. 115. The school went so far as to process the paperwork. Id. Malagrifa, while encouraging Mrs. Saxonis all the more, continuously enjoyed asking her if the job had been posted yet. Id.

All of this came to a head in August 1997, when Malagrifa and Lazaris invited Mrs. Saxonis to a "meeting." See AP. 115. That "meeting" was an "interview." Id. During the "interview", Malagrifa and Lazaris claimed that Mrs. Saxonis took school funds, harassed Fountain and was too old for the position. Id. Malagrifa and Lazaris abused Mrs. Saxonis' personal file, including medical

records. Id. Mrs. Saxonis, was subjected to ridicule, felt intimidated, and became upset and traumatized as the meeting progressed. Id. She felt that she could not leave the room. Id. Later, she reported this to Gauvain. Id. Gauvain took no action.

In August 1997, Mrs. Saxonis learned that Defendant LeBrun was hired to replace Defendant Lazaris. Id. Regarding Ms. LeBrun, there is a plethora of evidence indicating that she was unqualified for the position. The evidence reasonably supports the inference that Lynn School officials knew or should have known of her lack of qualifications. Id. There is sufficient evidence to suggest that once this evidence was brought to their attention, Lynn School officials covered-up this inequity.

LeBrun was questioned extensively regarding these issues with particular emphasis on her lack of qualifications. She can remember very little. In fact, when questioned regarding her work history, she stated she did not recall or did not know over 200 times. *Dep. not incl.* In any event, Defendants Malagrifa and Dr. Leonard appointed LeBrun to the teaching position prior to the date of her application.

On learning of this hiring, Donna Saxonis sought the Union's assistance. AP. 114. She was extremely upset and only spoke to Defendant Gauvain briefly. Id. The Union, knowing full well that her seniority had been improperly impaired, indicated that they could not help her because she did not have sufficient seniority rights. AP. 126.

Subsequent to this conversation, Mrs. Saxonis provided Gauvain with a letter transmitting notes regarding her employment situation. AP. 115. Although Gauvain acknowledges the meeting, he indicated that he does not recall ever receiving the document. He further states that Mrs. Saxonis never asked him to file a grievance. Id. at 126, 115. Despite the plain text of the Collective Bargaining Agreement, he adds that the Union has no written position regarding the replacement of bargaining unit members without notice and by less qualified individuals. See AP. 87.

Gauvain conceded that he did nothing on behalf of Mrs. Saxonis. E.g. AP. 126.He did not assist her in filing a grievance or inform her of her rights. Id. He did not reveal to Mrs. Saxonis any concerns regarding Malagrifa's intentional impairment of her seniority rights. Id. In fact, he plainly states that he had no duty to represent a long-term substitute at all. Gauvain, in his deposition

some four years later, stated that he does not know if Mrs. Saxonis was ever a long-term substitute.

Mrs. Saxonis unknowingly instituted a grievance procedure by raising these issues with the school superintendent. Defendant Leonard (and his successor), in derogation of the requirements of the Contract, refused to issue a written decision. However, both the school and the Union take the position that Donna Saxonis is not entitled to the benefits of the CBA and, therefore, may not avail herself of the grievance process.

While indicating at his deposition that he would aggressively investigate complaints relating to such abuses, Defendant Leonard cannot even recall his hour-long meeting with Mrs. Saxonis. He did apologize for his inability to recall this meeting. Faced with no other procedural options and after providing requisite notice to the City of Lynn, Mrs. Saxonis filed suit. Initially and unsuccessfully, they attempted to find an attorney. Much of the case went forward *pro se*.

The Union's motion did not address Donna Saxonis' express claim regarding the breach of the duty of fair representation. See AP. 45 (Complaint at ¶ 214). The thrust of the Union's motion that it was not a party to the contract – an obvious reflection of their initial position that Donna Saxonis was not a member of the collective bargaining unit. AP. 126. The union did not raise the statute of limitations at all. Id. The union revised its position to claim that it could not be liable where Donna Saxonis was no longer a bargaining unit member at the time it learned of the grievance. Id. and 3. The City's motion focused squarely on its legal position that Mass. Gen. L. ch. 71, §§ 41 and 42 allowed the City to discharge at-will regardless of its own agreements or the provisions of the CBA.

This case came before the Massachusetts Court of Appeals following a grant of Summary Judgment, Kern, J., in her orders of May 20, 2002, and June 12, 2002.

The May 20, 2002, Order granted Summary Judgment to the Defendants Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO (hereinafter "Union"). The Superior Court held that Union had no obligation to Donna Saxonis since her grievance arose subsequent to her termination. Thus, the Superior Court avoided directly addressing the claim. The Superior Court denied Plaintiff's Motion for Reconsideration, indicating that the motion raised "nothing new."

The order of June 12, 2002, granted Summary Judgment to all other Defendants. The Court held that at-will employment permitted the City of Lynn to summarily discharge Donna Saxonis.

The Appeals Court granted Donna Saxonis partial relief against the City of Lynn, but limited her claim to unpaid wages and reliance damages. AP. 23. In one troubling aspect of the decision, the Appeals Court stated that Count II must be dismissed because she has cited no authority, either in case law, statue or the collective bargaining agreement establishing a viable public policy. AP. 25. This simply ignores the record. In fact, the trial court acknowledged Donna Saxonis' claim that the City violated express protections contained within the CBA, but ruled in the City's favor because it viewed Donna Saxonis as an employee at will.

Relative to the Union, the Appeals Court held that Mrs. Saxonis could not pursue claims for breach of the duty of fair representation occurring between December 1996 and May, 1997 because the claims were untimely. The Union did not seek summary judgment on the basis of the statue of limitations. AP. 126. In fact, the Union did not explicitly seek summary judgment on the breach of the duty of fair representation. The union consistently took the position that it did not owe Mrs. Saxonis a duty and acknowledged that it did not inform her of her grievance. In addition, there are significant facts supporting application of the discovery rule. These claims were never argued in the trial court.[6]

The Supreme Judicial Court denied Donna Saxonis' application for further appellate review on February 2, 2005.

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[6] The only limitations argument related to the City of Lynn. The trial court did not rule in the City's favor on this issue.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I.

ARGUMENT RELATIVE TO THE UNION

This case is not about equating the duty of fair representation with a constitutional right. It is about the failure of process: The denial of meaningful access to the grievance process or arbitration. The denial of the right to vindicate a claim for breach of the duty of fair representation on the merits and before a jury.

As this Court recognized, the duty of fair representation is a statutory right with constitutional *implications.* Vaca v. Sipes, 386 U.S. 171, 182 (1976) and Steele v. Louisville N.R.R., 323 U.S. 192, 198-199 (1944). Those constitutional implications raise the specter of due process and equal protection guarantees.

Massachusetts enacted a statutory duty of fair representation applicable to unions representing public employees. Mass. Gen. L. ch. 150E, §§ 5 and 10. The refusal to participate in good faith in mediation, fact finding and arbitration procedures constitutes a prohibited practice under the statute. Id. at §10(b)(3). Further, the Massachusetts Supreme Judicial Court stated that even if the Massachusetts statutes "did not provide for the duty of fair representation, the courts would infer it as a constitutional requirement." Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 341, 348 (1987). Thus, at the very minimum, a breach of the duty of fair representation impairs an employee's access to meaningful due process.

The due process concern regarding the breach of the duty of fair representation is heightened here because the Appeals Court held that Donna Saxonis was entitled to pursue at least part of her claim against the school system. Thus, the Appeals Court concluded that the grievance at issue was justiciable.

In fact, the Appeals Court's dismissal of the fair representation claim is on a completely different *factual* ground than the trial court's decision – and herein lies the due process concern. The complete text of the Appeals Court decision on this issue, as set forth in paragraph four of the opinion, states as follows:

> Saxonis's claim that the union breached the duty of fair representation in refusing to pursue her complaint of not being named Lazaris's successor fails (even if she was a member of the bargaining unit) because she has demonstrated no reasonable expectation of proving that the union's conduct was "arbitrary, discriminatory, or in bad faith" or "perfunctory or demonstrative of inexcusable neglect," Graham v. Quincy Food Service Employees Ass'n, 407 Mass. 601, 606, 555 N.E.2d 543 (1990) (citations omitted), as contrasted with a reasonable, good faith assessment that her grievances lacked merit. See id. at 609. See also Cappellano v. Massachusetts Bay Transp. Auth., 38 Mass. App. Ct. 231, 235, 646 N.E.2d 769 (1995). Cf. National Ass'n of Gov't Employees v. Labor Relations Comm'n., 38 Mass. App. Ct. 611, 613, 650 N.E.2d 101 (1995), in which the plaintiff was simply ignored. Saxonis's other allegations against the union are untimely and conclusory.

It is significant that the trial court did not hold that Donna Saxonis' claims against the union based on the duty of fair representation (Count I) were barred by the statute of limitations. AP. 2 et seq. The union, in fact, never raised the issue. AP. 126. Under Massachusetts law, the statute of limitations on a court action for breach of the duty of fair representation is three years. Graham v. Quincy Food Service Employees Ass'n, 407 Mass. 601, 612-614 (1990). Further, the limitations period does not begin to run until discovery of the action. See e.g. Mass. Gen. L. ch. 260, § 12. In fact, the case law suggests that the limitations period is tolled relative to actions for breach of the duty of fair representation until the union affirmatively repudiates its duty. Graham at 614, n.11. How then, under basic notions of due process, could the Appeals Court sit *de novo* on the limitations issue when the complete facts on this issue were not before the trial court. No court should issue summary judgment sua sponte without notice to the parties to bring forth evidence. Celotex v. Catrett, 477 U.S. 317, 326 (1986). This implicates the V and XIV amendments.

Further, the union did not seek summary judgment on the basis of the breach of the duty of fair representation. At the trial

level, the union initially took the position that it owed no duty to Donna Saxonis because she was a substitute teacher. AP. 126.

The trial court agreed with the union. The trial judge stated that Donna Saxonis was precluded from taking her action against the union to trial because, at the time she raised the complaint with the union, she was no longer employed. AP. 3. In other words, once Donna Saxonis was discharged, she lost access to the grievance and arbitration procedures to address her wrongful discharge and the accompanying loss of benefits under the collective bargaining agreement. The trial court justified this position by reasoning that since Donna Saxonis was no longer employed, she lost her status as a member of the collective bargaining unit. Therefore, the trial court concluded, the union no longer had a duty to represent her.

It did not matter that Mrs. Saxonis was a member of the bargaining unit when the grievance occurred. It did not matter that the union knew of the grievance at that time, but failed to disclose the existence of the grievance to Mrs. Saxonis. It did not matter that the employer's violation of the CBA permanently impaired access to *future* employment benefits. The trial court's position is untenable and was properly rejected by the Appeals Court. However, the Appeals Court was not entitled to simply substitute its judgment on the facts.

The Seventh Amendment of the United States Constitution provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved. . . ." U.S. CONST., amend. VII. This Court has held that the Seventh Amendment entitled employees to a jury trial relative to their claim of a breach of the duty of fair representation. The Court's focus in the Terry decision was whether an action based on fair representation was more of an equitable claim than a legal action. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 573 (1990).

The Seventh Amendment has never been interpreted in such a rigid manner to preclude the application of procedural devices for the just administration of cases. This Court, almost a century ago, held that summary judgment does not of itself violate the Seventh Amendment. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902).

However, Fidelity & Deposit Co. does not insulate summary judgment from constitutional scrutiny. Just the opposite. The case stands for the proposition that once the issue is made, the right of trial by jury accrues. Fidelity & Deposit Co. at 320.

"Summary judgment, applied properly, does not violate the Seventh Amendment." City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641, 657 (10th Cir. 1992). Applied improperly, it violates a significant and certain constitutional right. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (reversing summary judgment on Seventh Amendment grounds and holding that collateral estoppel precluded a new action).

Here, the appellate court sat de novo on issues not properly presented to the trial court. On the statute of limitations issues, for instance, this poses a significant problem because the role of the discovery rule and the equitable tolling of the limitation period is both factually sensitive and central to the case.

As discussed, the union also failed to seek summary judgment on the issue of fair representation. The factual assumption that the union did not act in bad faith based on their failure to disclose abuses to Mrs. Saxonis is questionable. The existence of documentary evidence establishing their knowledge of a practice to impair seniority rights should have precluded summary judgment.

In Massachusetts, in order to establish a breach of the duty of fair representation, the Plaintiff must show that a union's actions towards an employee were arbitrary, discriminatory or in bad faith. Graham at 606 (1990). In order to defeat summary judgment, the plaintiff must show that her grievance is "*arguably* meritorious," and provide some evidence that the union acted in bad faith. Graham at 607, 609.

Proof of a grievance's merit, however, is circumstantial evidence that the failure to process the claim constituted bad faith. Harrison v. United Transportation Union, 530 F.2d 558, 561 (4th Cir. 1975). Trial courts instinctively know that issues of good faith – central to the duty of fair representation - rarely are amenable to summary judgment. See e.g., Dewey v. Clark, 180 F.2d 766 (1950).

Further, a union breaches its duty to an employee where its refusal to pursue a grievance or complaint is perfunctory or demonstrative of inexcusable neglect. Id. For instance, a union's failure to investigate constitutes breach of the duty of fair representation. Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291

(1st Cir. 1978) (finding breach of duty of fair representation in union's failure to respond to employee's repeated requests that the union investigate and process his discharge grievance); De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281 (1st Cir.) (1970) (breach of duty of fair representation in union's failure to discern an obvious basis under the contract for pressing claims).

The "lack of a rational basis for a union decision, and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect." Id. Further, when discrimination is involved, a union's alleged good faith will not suffice to insulate it from the process of law. See Baker v. Local 2977, State Council 93, American Federation of State, County and Municipal Employees et al., 25 Mass.App.Ct. 439, 442 n.14 (1987) *citing* Carbone v. School Comm. of Medford, 12 Mass.App.Ct. 948 (1981).

In the Harrison case, a memorandum memorialized facts suggesting an agreement between a union and employer that a grievance would not be pursued in exchange for the resolution of a grievance of another employee. Harrison v. United Transportation Union, 530 F.2d 558, 561(4th Cir. 1975). The first circuit indicated that a jury could conclude that the grievance was "arbitrarily relinquished" in violation of the duty of fair representation. Id. In fact, Harrison went further by condemning the concealment of this arrangement from the employee. Id.

Harrison is clearly on point. A conscious decision not to notify the employee of both her grievance and the union's decision not to pursue it constituted "arbitrary action." Id. The court indicated that since the employee was a union member, concealment violated the union's constitution and by-laws and therefore constituted a breach of contract as well. Id. at 561.

Donna Saxonis, like the employee in the Harrison case, was a union member. The Harrison Court expressly held that the decision of the union to "withhold information" violated the duty of fair representation. Id. Succinctly put, if the employee's loss results from the deliberately misleading conduct of the union, the union is then held accountable. Further, if a conspiracy is alleged and established at trial, both the union and the employer may be liable for the breach of the duty of fair representation in addition to the contract claims. Id. at 561, 563.

At the outset of this argument it was noted that this Court recognized the duty of fair representation is a statutory right with constitutional *implications.* Vaca v. Sipes, 386 U.S. 171, 182 (1976) and Steele v. Louisville N.R.R., 323 U.S. 192, 198-199 (1944). The central point is articulated in Steele. Because of the importance of rights given up by employees in the collective bargaining process, constitutional protections are implicated without the duty of fair representation.

The inference of a constitutional requirement as discussed in Leahy, however, is expressed through a statutory scheme which provides employees a cause of action to vindicate the right. See Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 347-348 (1987).

As such, it is not easy to fit a constitutional protection relative to government action against a private or a quasi private party without the statutory enforcement device. What this Court meant in Steele was that certain constitutional problems arise when a legislature requires individuals to give up rights in favor of that statutory scheme. The way this Court resolved the problem was by acknowledgement that a statutory device to vindicate those rights must have sufficient weight. As such, due process is implicated when courts fail to provide an employee the opportunity to vindicate the right implicit in the duty of fair representation. In this sense, it is possible to see the V and XIV amendment implications by looking at the issue from the point of view of the employee vis a vis a court. If a court acts to insulate the union beyond the scope of their privilege, then the court has acted to limit an important right without process of law.

In any event, the effect of the union's initial position, in practice, cast Donna Saxonis outside the collective bargaining agreement structure. That position effectively denied her the right to grieve the matter or to seek arbitration. Had the union made that process meaningfully accessible to her, then she would not only have understood her legal options, but she would have been restored to benefits that the Appeals Court has allowed her to continue to pursue. But as the union has said – notwithstanding the collective bargaining agreement –Donna Saxonis was only a substitute.

II.

ARGUMENT RELATIVE TO THE CITY OF LYNN, MASSACHUSETTS AND ITS SCHOOL SYSTEM

Donna Saxonis established a right to continued employment under both the CBA and via an express agreement to employ her through the end of the school year. To the extent that Donna Saxonis' employment constituted a property interest, she was entitled to due process notice and a hearing before she could be discharged. Const. amends. V and XIV; Miline v. School Committee of Manchester, 381 Mass. 581, 583 (1980).

The existence of a constitutionally protected property interest depends on the nature of [Mrs. Saxonis'] interest under [Massachusetts] law." Miline at 583 *citing* Bishop v. Wood, 426 U.S. 341, 344 (1976). Under Massachusetts law, a teacher need not be tenured to have a property interest in her job if she can demonstrate a statutory or contractual right. Miline at 583.

For instance, in Miline v. School Committee of Manchester, due process was not implicated where the teacher could not demonstrate a right to continued employment under the CBA. Miline v. School Committee of Manchester, 381 Mass. 581, 582 n.2, and 583 (1980). In addition, due process is mandated where a teacher establishes that the reason for dismissal was fabricated or pre-textual; that the action was arbitrary or unreasonable or that a teacher's rights in relation to other teachers, tenured or non-tenured, were denied. Id. at 582, 583, n.4.

In Massachusetts, long term substitutes – unlike daily substitutes – are "given the same assignment 'for a predetermined period of time' which 'in many cases may be for the entire school year.' " Brophy v. School Committee of Worcester, 6 Mass.App.Ct. 731, 734 (1978). Long term substitutes are defined as teachers under the applicable CBA and are expressly included in the collective bargaining unit. AP. 83-86. The CBA formalizes long-term substitute status upon twenty days consecutive days of service. AP. 84-86. Under Massachusetts law, regular and continuous service by a long term substitute is counted for purpose of accruing seniority and tenure. Brophy at 537.

The CBA specifically mandates that members of the bargaining unit have preference and shall be kept in position. AP. 87. This provision is consistent with Massachusetts case law. On point, the Jackson case, citing to Carnig v. Carr, 167 Mass. 544 (1987), indicates that "[w]here an employee has left his own business at the employer's urging, to accept proffered permanent employment with the employer, the employee does not hold this position at the pleasure of the employer. Instead, the employer is obliged to retain the employee so long as the employer has work available and the employee performs it satisfactorily." Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8, 11-12 *citing* Carnig v. Carr.

The facts lay out a fact pattern where a substitute teacher, hoping for a full time position, was taken advantage of by a school principal. As a result, she was subject to his whim and caprice. School principals are not vested with the right to breach a CBA or take advantage of their employees. The placement of a person without any experience at the helm of a technical curriculum is not sound policy. Had the union and the school abided by their agreements, it would not have happened. Donna Saxonis asks for a jury trial as a matter of constitutional privilege.

CONCLUSION

Donna Saxonis requests that this Honorable Court grant her request for a writ of certiorari to review the decision of the Appeals Court of Massachusetts.

Respectfully Submitted,

Lester E. Riordan III
Law Office of Lester E. Riordan III
12 Pond Lane, EB-1N
Concord, Mass. 01742
Telephone (978) 341-0404

(2)

Supreme Court, U.S.
FILED

No. 04 1596 MAY 3 - 2005

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DONNA SAXONIS,

PETITIONER(S)

V.

LYNN TEACHERS UNION LOCAL 1037, ET AL.,

RESPONDENT(S)

ON PEITION FOR WRIT OF CERTIORARI TO THE
APPEALS COURT OF MASSACHUSETTS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LESTER E. RIORDAN III
COUNSEL OF RECORD
12 POND LANE,
SUITE EB-1N
CONCORD, MA 01742
BBO# 633725
1-978-341-0404

APPENDIX TABLE OF CONTENTS

MEMORANDUM AND ORDER: ON DEFENDANT'S THE LYNN TEACHERS UNION LOCAL 1037 AMERICAN FEDERATION OF TEACHERS AFL-CIO AND JOSEPH G. GAUVAIN'S MOTION FOR SUMMARY JUDGMENT-ORDER-THE MOTION FOR SUMMARY JUDGMENT DATED MAY 21, 2002.. . . . . .AP.1

MEMORANDUM AND ORDER: ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED JUNE 12, 2002. . . . . AP.8

CLERK'S NOTICE OF THE DENIAL OF THE MOTION FOR RECONSIDERATION DATED JULY 8, 2002. . . . . .AP.19

NOTICE OF DOCKET ENTRY ON SUMMARY JUDGMENT DATED JULY 18, 2002. . . . . .AP.20

MASACHUSETTS APPEALS COURT OPINION DATED NOVEMBER 8, 2004. . . . . .AP.23

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW, DATED: FEBRUARY 2, 2005 . . . . AP.29

CONSTITUTIONAL AND STATUTORY PROVISIONS. . . .AP.30

EXCERPTS FROM COMPLAINT AND JURY CLAIM. AP.38

EXCERPTS FROM MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AP.49

EXCERPTS FROM MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION AP.53

PLAINTIFFS' GENUINE ISSUES OF MATERIAL FACT THAT SHOULD BE DETERMINED BY A JURY. AP.64

EXCERPTS FROM BRIEF FOR APPELLANT. AP.73

EXCERPTS FROM BRIEF IN SUPPORT THEREOF FURTHER APPELLATE REVIEW AP.79

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE SCHOOL COMMITTEE CITY OF LYNN AND THE LYNN TEACHERS UNION LOCAL 1037, AFT, AFL-CIO. AP.82

AFFIDAVIT OF JACQUELINE WHYTE. AP.101

LETTER FROM JOSEPH G. GAUVAIN TO ALBERT MALAGRIFA DATED MAY 1, 1997. . . . . .AP.113

AFFIDAVIT OF DONNA LINDA SAXONIS. AP.115

BRIEF OF THE DEFENDANTS' THE LYNN TEACHERS UNION LOCAL 1037, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND JOSEPH G. GAUVAIN, PRESIDENT OF THE LYNN TEACHERS UNION SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OF DISMISSAL. AP.126

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: ESCV2000-01367-C

RE: Saxonis et al v Gauvain Joe G/Pres/Loc 1037/ et al

TO: Lester E Riordan III, Esquire
81 Washington Street
Suite Eight
Salem, MA 01970

NOTICE OF DOCKET ENTRY

You are hereby notified that on 05/20/2002 the following entry was made on the above referenced docket:

MEMORANDUM and ORDER: on Deft's The Lynn Teachers Union Local 1037 American Federation of Teachers AFL-CIO and Joseph G. Gauvain's Motion for Summary Judgment-Order- The motion for Summary Judgment is Allowed for the Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO and Joseph G Gauvain. (Leila Kern, Justice)

Dated at Lawrence, Massachusetts this 21st day of May, 2002.

Thomas H. Driscoll Jr.,
Clerk of the Courts
BY: Kevin Jones Assistant Clerk
Telephone: (978) 687-7463

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

ESSEX, ss CIVIL ACTION No. 00 -1367 -
C

DONNA SAXONIS, and another[1]

V.

THE CITY OF LYNN, and others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS THE LYNN TEACHERS UNION LOCAL 1037 / AMERICAN FEDERATION OF TEACHERS / AFL CIO AND JOSEPH G. GAUVAIN'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

---

[1] Paul Saxonis

[2] Patrick J. McManus, Mayor, Lynn Public Schools and Dr. James Mazareas, Superintendent, Lynn School. Committee Members 1996-200 1, Judith A. Flanagan Kennedy, Frank Carrabba, Stephen *3.* Duffy, William F. McGuiness, George K. Mazareas, William M. McDonald, Timothy McManus, Patricia M. Capano, Donna M. Cappola, Madelyn Day Barry, Loretta Cuffe-O'Donnell, Carolyn A. Murray, Dr. James T. Leonard, Retired Superintendent, Edward B. Johns, Deputy Superintendent, Patricia M. Libby, Director of Human Resources, Bartley *3.* Conlon, Principal LVTI [Lynn Vocational Technical Institute, Albert G. Malagrifa, Retired Principal LVTI, Evelyn G. Lazaris, Retired Teacher LVTI, Lorraine A. LeBrun, Teacher LVTI, Joseph O'Hagan, Vice-Principal LVTI, Joseph G. Gauvain, President, and The Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO.

This action arises from the choice of the Lynn School Department not to hire Donna Saxonis as a Cosmetology Teacher for an available position at the Lynn Vocational Technical Institute ("LVTI"). Although the plaintiffs are now represented by counsel, the Complaint was originally *filed pro se* and consists of twenty-one counts alleged against each of the twenty-eight 'Paul Saxonis defendants.[3] Defendants The Lynn Teachers Union Local 1037, the American Federation of Teachers, the AFL-CIO ("the Union") and Joseph G. Gauvain, President of the Union ("Gauvain"), now move for summary judgment under Mass.R.Civ.P. 56, asserting that there are no material facts' at issue as to them and they are entitled to judgment as a matter of law. For the following reasons, the Union and Gauvain's Motion for Summary Judgment is ALLOWED.

BACKGROUND

Donna Saxonis ("Saxonis") taught Cosmetology at the LVTI as a substitute teacher from December 2, 1996 to February 14, 1997. She was hired back as a long-term substitute teacher (one serving as a substitute for more than twenty consecutive school days) on April 3, 1997 and was terminated on May 9, 1997. Plaintiff's Opposition ("Plaintiff's Opp.") at Exhibit 4, the Agreement Between The School Committee City of Lynn and the Lynn Teachers Union Local 1037, AFT, AFL-CIO 1995-1996;1996-1997 ("the Union Contract") at

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[3] Count I Breach of Employment Contract; Count II Wrongful Termination; Count III Wrongful Termination and Civil Conspiracy; Count IV Intentional Interference with Advantageous Economic/Contractual Relations; Count V Fraud/Deceit; Count VI Intentional/Reckless Infliction of Emotional Distress of Donna Saxonis; Count VII Intentional/Reckless Infliction of Emotional Distress of Paul Saxonis; Count VIII Defamation against Lazaris (retired school teacher); Count IX Defamation against Malagrifa (retired principal); Count X Negligent Hiring, Retention and Supervision of Ms. Lazaris; Count XI Negligent Hiring, Retention and Supervision of Mr. Malagrifa; Count Xli Negligent Hiring, Retention and Supervision of Mr. Conlon (Principal appointed after Malagrifa); Count XIII Negligent Hiring, Retention and Supervision of Mr. Johns (Deputy Superintendent); Count XIV Negligent Hiring, Retention and Supervision of Dr. Leonard (retired Superintendent); Count XV Negligent Hiring, Retention and Supervision of Dr. Mazareas (Superintendent); Count XVI False Imprisonment; Count XVII Violation of Massachusetts Civil Rights Act; Count XVIII Denied Due Process; Count XIX Invasion of Privacy against Malagrifa and Leonard; Count XX Invasion of Privacy against Ms. Lazaris; Count XIX Loss of Consortium.

Article 1(C) at p. 8; Affidavit of Patricia Libby ("Libby"), Director of Human Resources at p. 2, ¶ 5. Saxonis was substituting for Evelyn G. Lazaris ("Lazaris") who was out on leave. Lazaris returned to work on May 12, 1997 and on June 11, 1997, submitted paperwork to the Lynn School Department indicating she had retired effective immediately. Libby Aff. at p. 2, J6 and 7. On June 22, 1997, the Lynn School Department placed a notice of the open position in a local newspaper. Plaintiff's response to Defendant's Statement of Undisputed Facts ("Plaintiffs Response") at p.10, ¶ 16. Saxonis applied for the position. On August 6, 1997, Saxonis had a forty-five minute interview for the job with Albert Malagrifa ("Malagrifa"), Director of LVTL Plaintiffs Opp. at p. 5, ¶ 19. Also present t the interview was the retiring teacher, Lazaris. Plaintiffs Opp. at Exhibit 7, p. 5. On August 27, 1997 Saxonis learned that the Lynn School Department had offered the job to someone else. Plaintiffs Opp. at p. 5, ¶ 20. On that day Saxonis wrote a letter to Gauvain explaining her interview experience, and expressing reasons why she should not have been denied employment. Plaintiffs Opp. at Exhibit 7, p. 5. Saxonis contends that Gauvain received that letter on August 27, 1997. Plaintiffs Opp. at p. 5, ¶ 21.

In her complaint, Saxonis' claim against the Union and Gauvain was originally alleged as breach of an employment contract. At the hearing on the motion, however, Saxonis re-focused her argument and claimed the Union's breach of the contract was of the contract between it and the Lynn. School Committee. Saxonis argued that she retained rights under the Union Contract due to her past employment by the Lynn School Committee. Saxonis argues that since the Union serves "as the exclusive bargaining representative for all classroom teachers including substitute teachers on a long term assignment. . . ," the breach occurred when the Union failed to represent her interests on August 27, 1997, the day Gauvain allegedly received notice of her dispute.[4] The Union is claiming that Saxonis was not a party to the Union Contract when this dispute arose and thus is not entitled to any rights pursuant to it.

DISCUSSION

[4] Quotation taken from text of the Union Contract at Article 1(A) at Plaintiffs Opp., Exhibit 4, p.7.

Standard of Review

This court grants summary judgment where there is no genuine issue of material fact and the summary judgment record entitles the moving party to judgment as a matter of law. Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 281 (1997); Mass. R.Civ.P. 56 (c). The moving party bears the burden of affirmatively demonstrating both the absence of a triable issue and its entitlement to a judgment in its favor. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate an absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case or by showing that the nonmoving party has no reasonable expectation of proving an essential element of the claim at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion." Pederson v. Time, 404 Mass. at 17. In setting out facts, the court resolves any conflicts in the summary judgment record and makes all logically permissible inferences in the plaintiff's favor. Ulwick v. DeChristopher, 411 Mass. 401, 402 (1991).

Breach of Contract

The Union and Gauvain argue that in order for the Union Contract to apply to Saxonis, she had to be an active employee of the Lynn School Department at the time her grievance arose, August 27, 1997. Since Saxonis was neither a party to an employment contract with the Lynn School Committee at that time nor even an at-will employee, the Union and Gauvain can not be charged with breach of the Union contract with the Lynn School Committee.

The Union Contract: Article I: "Union Recognition, Jurisdiction and Definitions" states:

A. Union Recognition: The Lynn School Committee recognizes the Lynn Teachers Union.. . as the exclusive bargaining representative for all classroom teachers including substitute

teachers on a long term assignment, excluding all other employees of the School Department.

B. Jurisdiction: The jurisdiction of the Union shall include those persons now or hereafter who perform the duties or functions of the categories of employees in the bargaining unit, regardless of whether these duties or functions are performed by present, or modified by new processes or equipment.

C. Definitions: The term "teacher" and the term "person" as used in this Agreement means a person employed by the Committee in the bargaining unit as described in Article I. . . . The term "Committee" as used in this Agreement shall be understood to mean the School Committee of the City of Lynn.... The term "substitute teacher on a long term assignment" shall mean a substitute who has completed twenty (20) consecutive school days in one assignment.

Plaintiff's Opp. at Exhibit 4, Union Contract at pp. 7- 8.

According to Saxonis, Gauvain was on notice of her dispute with the Lynn School Committee through her letter of August 27, 1997. Plaintiff's Opp. Exhibit 7 at p. 3. It is undisputed that her prior employment with LVTI ended on May 9, 1997. Libby Aff. at p. 2, ¶ 5. Since there was no employment relationship between Saxonis and the Lynn School Committee after May 9, 1997, Saxonis does not fall under the jurisdiction of the Union as set forth in the contract, and the Union had no duty to act as her "exclusive bargaining representative."

Plaintiffs Opp. at Exhibit 4, Union Contract at p. 7. In addition, the Grievance Procedures, as set forth in the contract, set out that, "1. A 'grievance' shall mean a complaint *by an employee* or the Union that there has been a violation, misinterpretation, or inequitable application of any of the provisions of this Agreement. Plaintiffs Opposition at Exhibit 4, p. 47. (Emphasis added.) Since Saxonis was not an employee when her grievance arose, she did not fall under the protections granted by the Union Contract.

To maintain an action for a breach of a contract even if she was not a party to that contract, Saxonis must show that she was an intended

beneficiary of it.. Avala v. Boston. Housing Authority, 404 Mass. 689, 699-700 (1989). Saxonis would be an intended beneficiary if "recognition of a right to performance in [Saxonis] is appropriate to effectuate the intention of [the Union and the Lynn School Committee and... the circumstances indicate that the [Union] intends to give [Saxonis] the benefit of the promised performance." Rae v. Air-Speed. Inc., 386 Mass. 187, 194 (1982). Saxonis was not employed by the Lynn School Committee at the time she was denied employment as a Cosmetology teacher. Therefore, at the time of her dispute, Saxonis was not party to the Union Contract, nor was she an intended beneficiary.

ORDER

For the above reasons, the motion for summary judgment is ALLOWED for the Lynn Teachers Union, Local l037. American Federation of Teachers, AFL-CIO, and Joseph G. Gauvain.

DATE: May 20, 2002

s/ Leila R. Kern

Justice of the Superior Court

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: ESCV2000-01367-C

RE: Saxonis et al v Gauvain Joe G/Pres/Loc 1037/ et al

TO: Lester E. Riordan III, Esquire
81 Washington Street
Suite Eight
Salem, MA 01970

NOTICE OF DOCKET ENTRY

You are hereby notified that on 06/12/2002 the following entry was made on the above referenced docket:

MEMORANDUM and ORDER: on Defts Motion for Summary Judgment-For the above reasons Deft's motion for summary judgment is Allowed. (Leila Kern, Justice)

Dated at Lawrence, Massachusetts this 12th day of June, 2002.

Thomas H. Driscoll Jr.,
Clerk of the Courts
BY: Kevin Jones Assistant Clerk
Telephone: (978) 687-7463

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS **SUPERIOR COURT**
CIVIL ACTION No. 00- 1367C

DONNA SAXONIS, and another[5]

V.

THE CITY OF LYNN, and others[6]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR. SUMMARY JUDGMENT

INTRODUCTION

This action arises from the Lynn School Department's decision not to hire Donna Saxonis *("Mrs. Saxonis")* as a Cosmetology Teacher for an available position at the Lynn Vocational Technical Institute ("LVTI"). Although the plaintiffs (Mrs. Saxonis and her husband) are now represented by counsel, the Complaint was originally *filed pro se* and consists of twenty-one counts alleged against each of the twenty-eight defendants[7]. Prior to ruling on the instant Motion for

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[5] Paul Saxonis

[6] Patrick *J.* McManus, Mayor, Lynn Public Schools and Dr. James Mazareas, Superintendent, Lynn School Committee Members 1996-200 1, Judith A. Flanagan Kennedy, Frank Carrabba, Stephen *3.* Duffy, William F. McGuiness, George K. Mazareas, William M. McDonald, Timothy McManus,. Patricia M. Capano, Donna M. Cappola, Madelyn Day Barry, Loretta Cuffe-O'Donnell, Carolyn A. Murray, Dr. James T. Leonard, Retired Superintendent, Edward B. Johns, Deputy Superintendent, Patricia M. Libby, Director of Human Resources, Bartley 3. Conlon, Principal LVTI [Lynn Vocational Technical Institute], Albert G. Malagrifa, Retired Principal LVTI, Evelyn G. Lazaris, Retired Teacher LVTI, Lorraine A. LeBrun, Teacher LVTI, Joseph O'Hagan, Vice-Principal LVTI, Joseph 0. Gauvain, President, and The Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO.

[7] Count 1 Breach of Employment Contract; Count II Wrongful Termination; Count III Wrongful Termination and Civil Conspiracy; Count IV Intentional Interference with Advantageous Economic/Contractual Relations; Count V Fraud/Deceit;

Summary Judgment, this Court ruled on Cross-Motions to Strike Statements of Material Facts made pursuant to Superior Court Rule 9A *(b)(5),* allowing defendant's motion and denying plaintiffs motion. The court has allowed the Motion for Summary Judgment of defendants The Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO and Joseph G. Gauvain, President. Now the remaining defendants (collectively referred to as "the City") move for Summary Judgment under Mass.R.Civ.P. *56,* asserting that there are no material facts at issue-as to them and they are entitled to judgment as a matter of law. For the following reasons, the defendants' Motion for Summary Judgment is ALLOWED.

BACKGROUND

For the purpose of summary judgment, the undisputed facts are as follows. On December 1, 1996, Paul Bucarri ("Bucarri"), the Acting Head of the Cosmetology Department at ("LVTI") contacted Mrs. Saxonis and asked her to serve as substitute teacher for Evelyn G. Lazaris ("Lazaris") who had become ill in November 1996, and was out on sick leave. Defendants' Statement of Undisputed Facts ("Defendants' Statement") at ¶j 2 and 3. Mrs. Saxonis taught Cosmetology at the LVTI as a day-to-day substitute teacher from December 2, 1996 to February 14, 1997. j. at ¶ *5;* Memorandum of Law in Support of Defendants' Motion for Summary Judgment Defendants' Memo.") at Exhibit 2, ¶ 202 and 381. On December 19,

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Count VI Intentional Reckless Infliction of Emotional Distress of Donna Saxonis; Count VII Intentional Reckless Infliction of Emotional Distress of Paul Saxonis; Count VIII Defamation against Lazaris (retired school teacher); Count IX Defamation against Malagrifa (retired principal); Count X Negligent Hiring, Retention and Supervision of Ms. Lazaris; Count XI Negligent Hiring, Retention and Supervision of Mr. Malagrifa; Count XII Negligent Hiring, Retention and Supervision of Mr. Conlon (Principal appointed after Malagrifa); Count XIII Negligent Hiring, Retention and Supervision of Mr. Johns (Deputy Superintendent); Count XIV Negligent Hiring, Retention and Supervision of Dr. Leonard (retired Superintendent); Count XV Negligent Hiring, Retention and Supervision of Dr. Mazareas (Superintendent); Count XVI False Imprisonment; Count XVII Violation of Massachusetts Civil Rights Act; Count XVIII Denied Due Process; Count XIX Invasion of Privacy against Malagrifa **and** Leonard; Count XX Invasion of Privacy against Ms. Lazaris; Count XIX Loss of Consortium.

1996, Mrs. Saxonis was notified that Albert Malagrifa ("Malagrifa"), principal of LVTI, had decided to rotate substitute teachers who were filling in for Lazaris. Defendants' Statement at ¶ 6. Malagrifa was unsure whether Lazaris would return as a teacher, so he rotated various substitutes in order to evaluate possible replacements. Id. at ¶ 9. Mrs. Saxonis was hired back as a long- term substitute teacher (one serving as a substitute for more than twenty consecutive school days) on April 3, 1997 and was terminated on May 9, 1997 when Lazaris returned from sick leave. Id. at ¶ 12; Affidavit of Patricia Libby ("Libby"), Director of Human Resources at p.2, ¶¶ 3 and 5.

On June 11, 1997, Lazaris submitted paperwork to the Lynn School Department indicating she had retired effective immediately. Libby Aff. at p.2, ¶16 and 7. On June 22, 1997, the Lynn School Department placed a notice of the open position in a local newspaper. Plaintiffs' Response to Defendants' Superior Court Rule 9A(b)(5) Statement of Material Facts And Law in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ('Plaintiffs' Response to Defendants' Statement of Undisputed facts") at p.10,¶16. Mrs. Saxonis applied for the position as did Lorraine LeBrun ("LeBrun"). Defendants' Statement at ¶17. On August 6,. 1997, Mrs. Saxonis had a forty-five minute interview for the job with Albert Malagrifa ("Malagrifa"), Director of LVTI. Plaintiffs' Opposition to Defendants' The Lynn Teachers Union Local 1037, the American Federation of Teachers, the AFL-CIO and Joseph G. Gauvain, President of the Union (collectively "the Union")'s Motion for Summary Judgment ("Plaintiffs' Opp. to the Union's Motion") at p. *5,*¶ 19. Also present at the interview was the retiring teacher, Lazaris. Id. at Exhibit 7, p. 5. On August 27, 1997 Mrs. Saxonis learned that the Lynn School Department had offered the job to someone else. Id. at p. 5, ¶ 20.

DISCUSSION

Legal Standard

This court grants summary judgment where there is no genuine issue of material fact and the summary judgment record entitles the moving party to judgment as a matter of law. Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. *275,* 281

(1997); Mass. R.Civ.P. *56* (c). The moving party bears the burden of affirmatively demonstrating both the absence of a triable issue and its entitlement to a judgment in its favor. Pederson v. Time. Inc., 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate an absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving' party's case or by showing that the nonmoving party has no reasonable expectation of proving an essential element of the claim at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Collev v. Benson, Young &.Downs Ins. Agency, Inc., 42 Mass.App.Ct. 527, 529 (1997). "If the moving party establishes the absence of a triable issue, the party, opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion." Pederson v. Time. 404 Mass. at 17. In setting out facts, the court resolves any conflicts in the summary judgment record and makes all logically permissible inferences in the plaintiff's favor. Ulwick v. DeChristopher, 411 Mass. 401, 492 (1991).

Breach of Employment Contract (Count I)

"As a general rule, where an employment contract, be it express or implied, contains no definite period of employment, it establishes employment at will." Jackson v. Action for Boston Community Development Inc., 403 Mass. 8, 9 (1988) (citations omitted). Mrs. Saxonis claims that since the City offered her employment until the end of the year, a definite period, she was not an employee at will. Therefore, terminating her before the end of the year was a breach of her employment contract.

The City claims they did not breach n employment contract with Mrs. Saxonis because Mrs. Saxonis was by statute an at will employee regardless of the amount of time she was allegedly promised employment. Under G.L. c. 71, § 41 and 42, all teachers are at will employees until they serve three consecutive years. Section 41 of G.L. c. 71 defines a professional teacher as one who has "served in the public schools of a school district for the three previous consecutive school years." 1t is undisputed that Mrs. Saxonis did not teach for three consecutive years, and thus did not

qualify for professional teacher status. Even if plaintiff had been able to teach until the end of the year, she still would have been an at will employee. "Teachers without professional teacher status shall otherwise be deemed employees at will."[8]
G.L. c. 71, § 42.

Section 42 of G.L. c. 71 sets out that teachers who "ha[ve] been teaching in a school system for at least ninety calendar days shall not be dismissed unless [they have] been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail." Although Mrs. Saxonis alleges she was promised longer employment, she actually worked 66 calendar days during the 1996-1997 school year —45 calendar days from December 2, f96 until February 14, 1997, and 22 calendar days from April 3, 1997 until May 9, 1997. Plaintiffs' Response to Defendants' Statement of Undisputed Facts at p. 6, Response to ¶ *5.* Consequently, dismissal of Mrs. Saxonis did not require notice or a hearing as she had not met the statutory requirement of ninety days, and there was no denial of due process (Denied Due Process.. Count XVIII). With regard to the-breach of contract claim, the City argues that "[e]mployment at will is terminable by either the employee or the employer without notice, for almost any reason or no reason at all" Jackson v. Action for Boston Community Development. 403 Mass. 8,9 (1988) (citations omitted). There are public policy exceptions to this rule whereby an at will employee may challenge dismissal. Upton v. JWP Businessland, *425* Mass. *756,* 757 (1997). None of those exceptions are applicable in this case. Nor is this a situation where the school is seeking to avoid paying Mrs. Saxonis

[8] Other relevant language in G.L. c. 71, § 42 includes: "A principal may dismiss or demote any teacher or other person assigned full-time to the school, subject to the review and approval of the superintendent.... A teacher who has been teaching in a school system for at least ninety calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for the dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal or superintendent, as the case may be, and to present information pertaining to the basis for the decision and to the teacher's status. The teacher receiving such notice may be represented by an attorney or other representative at such meeting with the principal or superintendent."

amounts she had already earned. Fortune v. National Cash Realster Co.. 373 Mass. 96, 102 (1977). Since no exceptions to the at will termination apply, Mrs. Saxonis' claim that the Lynn School Department breached their contract with her must fall as a matter of law.

Wrongful Termination (Count II)

Count two of the complaint must also fail as a matter of law. Mrs. Saxonis claims that Malagrifa unlawfully terminated her employment in violation of G.L. c. 71, § 42. The Court infers, although such is not explicitly alleged in the complaint, that Mrs. Saxonis bases her argument on her understanding that she would be employed as a substitute teacher through the end of the school year. However, it has been established that Mrs. Saxonis was an at will employee when she was dismissed. Dismissal of an at will employee can be for any reason or no reason at all provided there is no violation of public policy or countervailing issues of equity involved. Upton v. J'WP Businessland. *425* Mass. *756,* 757 (1997); Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8,9 (1988); Fortune v. National Cash Register Co., *373* Mass. 96, 102 (1977).

Civil Conspiracy (Count III)

In count three, Mrs. Saxonis alleges that the defendants conspired to accomplish an unlawful purpose, i.e., her unlawful termination. Since Mrs. Saxonis has failed as a matter of law on the issue of wrongful termination, her claim of civil conspiracy lacks the essential element of a tortious activity being spurred on by another, and the claim must fail as a matter of law. See Kurker v. Hill, 44 Mass.App.Ct. 184, 189 (1998) citing Nelson v. Nason, *343* Mass. 220, 222 (1961) (recovery allowed where defendant's purposeful conduct, caused another to engage in tortious activity).

Intentional Interference with Contractual Relations (Count IV)

"In an action for intentional interference with contractual relations, the plaintiff must prove that: (1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that

contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." G.S. Enters.. Inc. v. Falmouth Marine. Inc., 410 Mass. 262, 272 (1991), citing United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812-817 (1990). Since it has been established that there was no contract in existence between Mrs. Saxonis and the Lynn School Department there can be no interference therewith, intentional or not.

Fraud/Deceit (Count V)

Mrs. Saxonis' claim of fraud involves materials LeBrun allegedly submitted to the Lynn School Department for the purpose of getting the available teaching job. To recover on a claim for fraud, Mrs. Saxonis must establish by a preponderance of the evidence that she reasonably relied to her detriment on a false statement of material fact made by the defendant. Danca v. Taunton Savings Bank, 385 Mass. 1, 8 (1982); Rood v. Newberg, 48 Mass.App.Ct. *185,* 192 (1999). In this count, however, Mrs. Saxonis is claiming LeBrun made false statements to the School, and based on those statements she was harmed by not getting the job. Mrs. Saxonis did not rely on the allegedly false statements made by LeBrun, however, and so cannot recover on this claim.

Intentional Infliction of Emotional Distress (Count VI and VII)

Common law actions for intentional and negligent infliction of emotional distress arising out of and in the course of employment are barred by the exclusivity provision of the Workers' Compensation Act, G.L.c. 152, § 24. Green v. Wyman-Gordon Co., 422 Mass. *551, 558* (1996) ("[C]ommon law claims not barred by c. 15 1B, notably the claims for intentional and negligent infliction of emotional distress, are barred by the exclusivity provision of the workers' compensation act, G.L.c. 152, Sec. 24.")[9]

Defamation (Count VIII and IX)

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[9] "An employee shall be held to have waived his right of action at common law.. . in respect to an injury that is compensable under this chapter, to recover damages for personal injuries... ." G.L.c. 152, § 24.

In order to maintain an action for defamation, a plaintiff must show that the defamatory statement was communicated to a third party. Comerford v. West End Street Realty Co., 164 Mass. 13 *(1895)*. "It is enough that it is communicated to a single individual other than the one defamed." Brauer v. Globe Newsvayer Co., *351* Mass. 53, *56* (1966)(citations omitted). An employer has a conditional privilege to disclose defamatory information concerning an employee where the publication is reasonably necessary to serve the employer's interest in the fitness of the employee to perform her job. McCone v. New England Tel. & Tel. Co., *393* Mass. 231, 235 (1984); Mullen v. Ludlow Hospital Society, 32 Mass.App.Ct. 9.8, 971 (1992). Here, there are no allegations of publication to individuals other than those involved in the interview process, and any disclosure of information fails under the conditional privilege.[10] Without publication, a claim for defamation must fail as a matter of law.

Negligent Hiring Retention and Supervision (Counts X through XV)

Mrs. Saxonis claims that the City negligently hired, retained and supervised various members of the Lynn School Department. A claim for negligent supervision resulting from a termination is barred by he exclusivity provisions of the Workers' Compensation Act. Green V. Wyman-Gordon Co., 422 Mass. 551, *558* (1996); G.L.c. 152, 24. Also, "[the torts of negligent hiring, retention, and supervision ordinarily relate to situations where 'employees are brought into contact with members of the public in the course of an employer's business.' Thus, the duty of an employer to avoid negligence in the hiring, supervision and retention of employees' ordinarily runs to members of the public, not to employees." Vicareili v. Business International. Inc., *973* F.Supp. 241,246 (D.Mass.1997). See also, Choroszv v. Wentworth Institute of Technoloy, *915* F.Supp. 446,452 (D.Mass.1996) (employee's negligent supervision/retention claim against employer "troublesome" and unsupported by Massachusetts law).

[10] As a municipality, the City cannot be liable for "any claim arising out of an intentional tort, including. . . libel [and] slander." G.L. c. 258, § 10 (c).

False Imprisonment (Count XVI)

Mrs. Saxonis claims that she was falsely imprisoned for the duration of the forty-five minute job interview. False imprisonment is the intentional, unjustified confinement of a person, directly or indirectly, by force or by threat, which that person is conscious of or by which he or she is harmed. Ortiz v. Hampden County, 16 Mass.App.Ct. 138, 140 (1983). Material to the inquiry is whether Mrs. Saxonis was free to leave the office during the interview, and if not, was the City justified in preventing Mrs. Saxonis from leaving the, office. Id. Mrs. Saxonis refers to the meeting as a job interview. Plaintiffs' Opp. to the Union's Motion for Summary Judgment at Exhibit 7, p. 5. Since the meeting was for the purpose of performing a job interview all reasonable inferences suggest Mrs. Saxonis was free to leave at any time. Defendants' Memo at Exhibit 2, Answer to Interrogatory No. 15 at (a) 'line 5 to 10. Without knowledge of confinement and no avenue of escape, this claim fails as a matter of law.

Violation of Massachusetts Civil Rights Statute G.L. c. 12, § 111 (Count XVII)

To prevail on a claim under the Massachusetts Civil Rights Act, Mrs. Saxonis must prove that "[her] exercise of enjoyment of rights secured by the Constitution or the laws of either the United States or the Commonwealth, have been interfered with, or attempted to be interfered with, and that the interference or attempted interference was by threats, intimidation or coercion." Freeman v. Planting Board of West Boylston, 419 Mass. at *548, 564 (1995).* At will employment does not give the employee a secured right to continued employment by the employer. Webster v. Motorola Inc., 418 Mass. 425,430 (1994). Since Mrs. Saxonis had no agreement with the school at the time of her interview, she had no secured right to employment with them, and this claim fails as a matter of law.

Invasion of Privacy (Counts XIX and XX)[11]

Mrs. Saxonis claims the City's ordering her to take a physical examination and Lazaris reviewing her personnel file during the interview on August 6 invaded her privacy. The three-year statute of limitations for tort actions began to run on Mrs. Saxonis' invasion of privacy claim arising out of the physical examination on the day of the exam. Finney v. Madico, *Inch,* 42 Mass.App.Ct. 46, 52(1997); G.L. c. 214, § lB. The examination occurred while she was a substitute teacher which occurred more than three years before suit was filed on August 4, 2000. With regard to the presence of Lazaris at the interview, "[i]n determining whether there is a violation of [plaintiff's right to privacy], it is necessary to balance the employer's legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure." Brat v. International Business Machines Corp. 392 Mass. 508, 521 (1984). Here, defendant alleges without contradiction that Lazaris was on the Hiring Committee responsible for finding her replacement. Consequently there was no publication of private information, and this claim fails as a matter of law.

Loss of Consortium (Count XXI)

A loss of consortium claim is dependent on a finding of liability against the City for claims brought by Mrs. Saxonis. Since there are no claims which survive summary judgment, Paul Saxonis's loss of consortium claim fails as a matter of law.

ORDER

For the above reasons, Defendants' Motion for Summary Judgment is ALLOWED.

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[11] Denied Due Process (Count XVIII'): see Discussion, *supra* at Breach of Contract (Count I).

DATE: June 12, 2002

s/ Leila Kern

Justice of the Superior Court

Commonwealth of Massachusetts
County of Essex
The Superior Court

Civil Docket ESCV2000-01367C

RE: Saxonis et al v Gauvain Joe G/Pres/Loc 1037/ et al

TO: Lester E Riordan Ill, Esquire
81 Washington Street
Suite Eight
Salem, MA 01970

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 07/08/2002:

RE: Plaintiff Paul Saxon Is, Donna Saxonis 's MOTION for reconsideration of Court Order dated May 20, 2002, (P# 's 52, 53 and 54 with/supporting Memoradum of Law; Certificate of Service., filed 6/4/02 is as follows:

Motion (P#55) DENIED, After careful review of take memo in support of the motion for reconsideration, the court agrees with the opp., There is nothing new which would cause the court to reverse its judgment. (Leila Kern, Justice) Notices mailed July 08, 2002

Dated Massachusetts this 8th day of July, 2002.

Thomas H. Driscoll Jr.,
Clerk of the Courts
BY:
Kevin Jones
Assistant Clerk
Telephone: (978) 687-7463
Copies mailed 07/08/2002

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: ESCV2000-01367-C

RE: Saxonis et al v Gauvain Joe *G/Pres/Loc 1O37/* et al

TO: Lester E Riordan III, Esquire
81 Washington Street
Suite Eight
Salem, MA 01970

NOTICE OF DOCKET ENTRY

You are hereby notified that on 07/18/2002 the following entry was made on the above referenced docket:

SUMMARY JUDGMENT for Plaintiff Paul Saxonis, Donna Saxonis is hereby dismissed against Defts Gauvain Joe G/Pres/Loc1037/, Afi-Cio/Teachers/Local 1037, Capano Patricia, Berry Madelyn Day, Lynn Public Schools, Lynn City of, Libby Pat/Dirctr/Human Resource, Leonard Dr James T/Ret Super in, McManus Patrick J/Mayor/Lynn, Malarias Geo K, Murray Carolyn, McManus Timothy, McGuiness Wm F, Malagrifa Al G/Ret/Prin/Lvti, McDonald Wm M, Mazares Dr Js /Superintendent, Lynn School Cmte/Mem/1996-2001, Duffy Stephen J, Coppola Donna, Conlon Bartley/Principle/Lvti, Carrabba Frank M, Johns Ed/Deputy Superintendent, O'Donnell Loretta Cuffe, O'Hagan Joseph/Vp/Lvti, Lebrun La/Teacher/Lvti, Lazaris Evelyn G/Ret/Lvti/Teac, Kennedy Judith A Flanagan with costs (Leila Kern, Justice). Copies mailed July 18, 2002

Dated at Lawrence, Massachusetts this 18th day of July, 2002.

Thomas H. Driscoll Jr.,
Clerk of the Courts
BY: Kevin Jones Assistant Clerk
Telephone: (978) 687-7463

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# ESCV2000-O1367C

Saxonis et al vs. Gauvain Joe G/Pres/Loc 1037/ et al

SUMMARY JUDGMENT M.R.C.P. 56

This action came on to be heard before the Court, Leila Kern, Justice, presiding, upon motion of the defendant(s), Gauvain Joe G/Pres/Local 037/, Afl-Cio/Teachers/Local 1037, Capano Patricia, Berry Madelyn Day, Lynn Public Schools, Lynn City of, Libby Pat/Dirctr/Human Resource, Leonard Dr James T/Ret Superin, McManus Patrick J/Mayor/Lynn /Mazareas Geo K, Murray Carolyn, McManus Timothy, McGuiness Wm F, Malagrifa Al G/Ret/Prin/Lvti, McDonald Wm M, Mazares Dr Js /Superintendent, Lynn School Cmte/Mem/1 996-2001, Duffy Stephen J, Coppola Donna, Conlon Bartley/Principle/Lvti, Carrabba Frank M, Johns Ed/Deputy Superintendent, O'Donnell Loretta Cuffe, O'Hagan Joseph/Vp/Lvti, Lebrun La/Teacher/Lvti, Lazaris Evelyn G/Ret/Lvti/Teac,
Kennedy Judith A Flanagan, for Summary Judgment pursuant to Mass. R. Civ. P. 56- the parties having been heard - and the Court having considered the *pleadings.. depositions-answers to interrogatories-admissions- and affidavits, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law,

It is ORDERED and ADJUDGED:

That the Complaint of the Plaintiff (s), Paul Saxonis, Donna Saxonis be and hereby is DISMISSED against the Defendant (s), Gauvain Joe G/Pres/Loc1037/, Afl-Cio/Teachers/Local 1037, Capano Patricia, Berry Madelyn Day, Lynn Public Schools, Lynn City of, Libby Pat/Dirctr/Human Resource, Leonard Dr James T/Ret Superin, McManus Patrick J/Mayor/Lynn, Mazareas Geo K, Murray Carolyn, McManus Timothy, McGuiness Wm F, Malagrifa Al

G/Ret/Prin/Lvti, McDonald Wm M, Mazares Dr Js /Superintendent, Lynn School Cmte/Mem/1 996-2001, Duffy Stephen J, Coppola Donna, Conlon Bartley/Principle/Lvti, Carrabba Frank M, Johns Ed/Deputy Superintendent, O'Donnell Loretta Cuffe, O'Hagan Joseph/Vp/Lvti, Lebrun La/Teacher/Lvti, Lazaris Evelyn G/Ret/Lvti/Teac, Kennedy Judith A Flanagan, with costs.

Dated at Lawrence Massachusetts is 18th day of July, 2002.

s/ Thomas H. Driscoll Jr.,

Clerk of the Courts

Donna SAXONIS & another [FN1] *vs.* CITY OF LYNN & others. [FN2]

No. 02-P-1350.

November 8, 2004.

Practice, Civil, Summary judgment. *School and School Committee,* Appointment of personnel. *Estoppel. Contract,* What constitutes, Promissory estoppel, Employment. *Labor,* Fair representation by union.

Lester E. Riordan, III, for the plaintiffs.

James P. Lamarra for city of Lynn & others.

James J. Carrigan for Lynn Teachers Union, Local 1037, & another.

RESCRIPT.

The plaintiff, Donna Saxonis, alleges that she closed her beauty salon business of twenty-three years in December, 1996, in order to act as a permanent substitute for one Evelyn Lazaris, a cosmetology teacher at Lynn Vocational Technical Institute, in reliance on the assurances of the school's principal, Albert Malagrifa, and others at Malagrifa's direction, that Lazaris, then on indefinite leave, would be retiring at the end of the school year and that he would hire Saxonis to replace her. She further alleges that Lazaris did so retire but that Malagrifa instead hired one Lorraine LeBrun, who had falsified her job application, and that Malagrifa had improperly segmented Saxonis's employment as Lazaris's substitute to prevent her from accruing seniority. These were the central allegations of the plaintiffs' twenty-one count complaint against the twenty-six named defendants. Acting on separate motions by the school and city defendants and the union defendants, a judge of the Superior Court granted summary judgment on all of the plaintiffs' claims.

1. Saxonis claims that the judge erred in granting the defendants' motion to strike her opposition to their statement of material facts, and in denying her motion to strike the defendants' statement of facts. The judge deemed the defendants' statement of facts admitted for the purposes of the summary judgment motion. This ruling was within the judge's discretion and we will not disturb it. *Diamba v. Warner & Stackpole LLP,* 56 Mass.App.Ct. 397, 401 (200.2).

Nonetheless, none of our conclusions below would be different had the judge not deemed as admitted the defendants' statement of facts.

2. In acting on the motions for summary judgment, the judge was required, as are we, to accept Saxonis's allegations that Malagrifa and others acting on his behalf promised her employment both as a permanent substitute for Lazaris during the 1996-1997 school year, and as her replacement thereafter when she retired. See *Hull v. Massachusetts Port Authy.*, 441 Mass. 508, 509-510 (2004).(a) As to Malagrifa's promises to keep Saxonis in service as a permanent substitute, they cannot be enforced because they run counter to the express legislative policy that made her, as matter of law, an at-will employee. See G.L. c. 71, § 42, as amended through St.1993, c. 71, § *44.* Moreover, Saxonis was presumed to know that these representations were contrary to law and that she could not rely on them. See *McAndrew v. School Comm. of Cambridge,* 20 Mass.App.Ct. 356, 361 (1985); *Harrington v. Fall River Housing Authy.,* 27 Mass.App.Ct. 301, 307-310 (1989).(b) In contrast, Malagrifa was vested by law with the authority, subject to approval by Lynn's superintendent of schools, to hire Saxonis as Lazaris's replacement, see G.L. c. 71, § 59B, although he would not have been required to retain her for the ninety-day period necessary under G.L. c. 71, § 42, to give her rudimentary rights to notice and a hearing prior to dismissal. As explained in *McAndrew,* the promise or representation that was within Malagrifa's authority may form the basis for a detrimental reliance claim. *Id.* at 362- 365. A jury could reasonably conclude that, based on Malagrifa's promises and Saxonis's detrimental reliance thereon, a contract was formed to hire Saxonis as Lazaris's replacement (on an at-will basis), and that Saxonis could recover reliance damages (primarily from closing her business) for the breach. See *ibid.* See also *Loranger Constr. Corp.* v. *E.F. Hauserman Co.,* 376 Mass. 757, 760-761 (1978). Cf. *Rhode Island Hosp. Trust Nat!. Bank v. Varadian,* 419 Mass. 841, 848-850 (1995). Summary judgment should therefore not have been allowed on so much of Saxonis's complaint as alleges detrimental reliance by Saxonis arising out of the August, 1997, hiring of LeBrun. (c) Saxonis's claims regarding inadequate compensation for work she performed during the 1996-1997 school year were not dealt with by the judge and must be remanded for further factual development.

3. In count II of her complaint Saxonis alleges wrongful termination on two occasions while she served as a substitute for Lazaris: her replacement by another teacher for a period from February to March of 1997, and upon Lazaris's return from leave in May, 1997. With regard to the first incident, Saxonis has raised an inference that Malagrifa sought to rotate substitute teachers to save money for the district (due to the salary difference between day-to-day and long-term substitute teachers) and to prevent her from achieving seniority status. However, we agree with the trial judge that Saxonis has failed to identify a "clearly established public policy" violated in either instance. See *King v. Driscoll,* 418 Mass. 576, 582 (1994). She has cited no authority, either in statute, case law, or the collective bargaining agreement, establishing such a policy. While placement of an unlicensed and uncertified teacher as a long-term substitute was likely improper, it did not violate any employment rights clearly vested in Saxonis. See, e.g., *id.* at 583-585 & n. 7. Another teacher could have been selected to replace Saxonis at any time. Finally, Saxonis's claim for breach of the covenant of good faith and fair dealing cannot succeed as her complaint does not allege that her termination served to deprive her of compensation owed for past performance. See *King v. Driscoll,* 424 Mass. 1, 6-7 (1996); *Harrison v. NetCentric Corp.,* 433 Mass. 465, 473 (2001).

4. Saxonis's claim that the union breached the duty of fair representation in refusing to pursue her complaint of not being named Lazaris's successor fails (even if she was a member of the bargaining unit) because she has demonstrated no reasonable expectation of proving that the union's conduct was "arbitrary, discriminatory, or in bad faith" or "perfunctory or demonstrative of inexcusable neglect," *Graham v. Quincy Food Serv. Employees Assn. & Hosp., Library & Pub. Employees Union,* 407 Mass. 601, 606 (1990) (citations omitted), as contrasted with a reasonable, good faith assessment that her grievances lacked merit. See *Id.* at 609. See also *Cappellano v. Massachusetts Bay Transp. Authy.,* 38 Mass.App.Ct. 231, 235 (1995). Cf. *National Assn. of Govt. Employees v. Labor Relations Commn.,* 38 Mass.App.Ct. 611, 613 (1995), in which the plaintiff was simply ignored. Saxonis's other allegations against the union are untimely and conclusory.

5. We dispose of Saxonis's remaining claims as follows. (a) Count III (civil conspiracy and wrongful termination): Saxonis's bare and conclusory allegations of a grandiose plot and cover-up to prevent her hiring cannot survive summary judgment. Saxonis has failed to show a reasonable expectation of proving that any defendants acted in concert to unlawfully deprive her of employment. (b) Count IV (tortious interference with contractual or advantageous business relations): In his official capacity, Malagrifa is immune from liability under G.L. c. 258, § 10(c). To the extent he is sued in his individual capacity, Malagrifa cannot be liable for interfering with his own hiring decision. Saxonis's claims for tortious interference with her at-will employment during the 1996-1997 school year are also time-barred. Her argument regarding potential claims against all other defendants has not been sufficiently developed within the meaning of Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).(c) Count V (fraud and deceit): Saxonis's complaint pleaded with requisite specificity only the actions of LeBrun, and the judge did not err by addressing only this claim. See Mass.R.Civ.P. 9(b), 365 Mass. 751 (1974). On appeal, Saxonis states, without elaboration, that her "fraud prayer is much more extensive than Defendant LeBrun." We affirm the judge's dismissal of the claim against LeBrun for the reasons stated below and deem Saxonis's claim against all other parties waived. (d) Counts VI and VII (intentional infliction of emotional distress) and Counts X to XV (negligent hiring, retention, and supervision) are insufficiently argued to merit discussion. See Mass.R.A.P. 16(a)(4). Saxonis merely states that the motion judge erred in ruling that these claims are barred by the exclusivity provisions of the workers' compensation statute but does not go on to argue that the admissible evidence would warrant findings in her favor, on their respective elements. (e) Counts VIII and IX. (defamation) and Count XX (invasion of privacy) relate to Saxonis's employment interview on August 6, 1997, during which Lazaris served as hiring consultant to Malagrifa. Both claims fail as matter of law as the employer's actions were privileged. Saxonis has shown no reasonable expectation of proving her conclusory allegations that the meeting was a pretext for Malagrifa and Lazaris to subject her to a barrage of false accusations rather than a legitimate interview for the position. Count XVI (false imprisonment), also relating to the August 6, 1997, job interview, fails as matter of law. See *Foley v. Polaroid Corp.*, 400 Mass. 82,

91-92 (1987). (f) Count XVII (Massachusetts Civil Rights Act violation) fails because nowhere in the pleadings or the record is there any indication of interference with or an attempt to interfere with Saxonis's rights by "threats, intimidation, or coercion." See G.L. c. 12, § 11H, 11I.(g) The only discernable basis for Count XVIII (due process) is the assertion that Saxonis was entitled to written notice and a hearing before Lazaris returned in May, 1997. Even if Saxonis is treated as having served the requisite ninety days to give her hearing rights (see G.L. C. 71, § 42), no process was due under the statute as Lazaris had the right to return from leave at any time. Cf. *Boston Teachers Union, Local 66 v. School Comm. of Boston,* 386 Mass. 197, 215-216 (1982). (h) Count XIX (invasion of privacy) is waived by the failure to argue it on appeal. Moreover, the claim is time-barred. (i) Paul Saxonis's loss of consortium claim (Count XXI) piggybacks his wife's claims. We are unaware of any consortium cause of action solely for breach of an employment contract. See *Sena v. Commonwealth,* 417 Mass. 250, 265 (1994) (loss of consortium requires a tortious injury of spouse); *Zhang v. Massachusetts Inst. of Technology,* 46 Mass.App.Ct. 597, 607 (1999) (same). Moreover, Paul Saxonis's allegations appear to arise primarily from the effect of this litigation on the marriage rather than his wife's having suffered an illness or injury as a direct result of defendants' actions, consequent to which he, in turn, lost her society, companionship, or sexual availability. *Ibid.*

6. In accordance with this opinion, the judgment is affirmed as to all counts with the exception of that portion of count I relating to detrimental reliance and amounts owed for work performed during the 1996-1997 school year. As to that portion, the judgment is vacated and the matter is remanded to the Superior Court.
So ordered.

1. Her husband, Paul Saxonis.

2. The mayor of the city of Lynn; Lynn school committee members from 1996 to 2001; Lynn public schools; James Mazareas, superintendent, James T. Leonard, retired superintendent, Edward B. Johns, deputy superintendent, and Patricia M. Libby, director of human resources, Lynn public schools; Bartley J. Conlon, principal, Albert G. Malagrifa, retired principal, Joseph O'Hagan, vice principal, Lorraine A. LeBrun, teacher, and Evelyn G. Lazaris, retired teacher, Lynn

Vocational Technical Institute; Lynn Teachers Union, Local 1037, American Federation of Teachers and Joseph G. Gauvain, union president. Corp. (C) 2004 West. No Claim to Orig. U.S. Govt. Works. Term Doc 1 of 13

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Lester E. Riordan, III, Esquire
12 Pond Lane
Suite EB-IN
Concord, MA 01742

RE: Docket No. FAR-14525

DONNA SAXONIS & another

vs.

CITY OF LYNN & others

Essex Superior Court No. ESCV2000-01367 A.C. No. 2002-P-1350

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 02/02/05, the above- captioned application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: February 2, 2005

To: Lester E. Riordan, III, Esquire
James J. Carrigan, Esquire
John C. Mihos, Esquire
Richard L. Vitali, Ass't City Solicitor

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens

shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MASS. GEN. L. ch. 71, § 41

For the purposes of this section, a teacher, school librarian, school adjustment counselor, school social worker or school psychologist who has served in the public schools of a school district for the three previous consecutive school years shall be considered a teacher, and shall be entitled to professional teacher status as provided in section forty-two. The superintendent of said district, upon the recommendation of the principal, may award such status to any teacher who has served in the principal's school for not less than one year or to a teacher who has obtained such status in any other public school district in the commonwealth. A teacher without professional teacher status shall be notified in writing on or before June fifteenth whenever such person is not to be employed for the following school

year. Unless such notice is given as herein provided, a teacher without such status shall be deemed to be appointed for the following school year.

School principals, by whatever title their position may be known, shall not be represented in collective bargaining, but every principal shall have the opportunity to meet and discuss individually the terms and conditions of his employment in his school district with such district's superintendent and may be represented by an attorney or other representative, and shall be employed under written contracts of employment. Such contracts shall be for terms of up to three years in length. Failure of the superintendent to notify a principal of the proposed non-renewal of his contract at least sixty days prior to the expiration date of such contract shall automatically renew the contract for an additional one year period.

Except as provided herein, section forty-two shall not apply to school principals, assistant principals or department heads, although nothing in this section shall deny to any principal, assistant principal or department head any professional teacher status to which he shall otherwise be entitled. A principal, assistant principal, department head or other supervisor who has served in that position in the public schools of the district for three consecutive years shall not be dismissed or demoted except for good cause. Only a superintendent may dismiss a principal. A principal, assistant principal, department head or other supervisor shall not be dismissed unless he has been furnished with a written notice of intent to dismiss with an explanation of the grounds for the dismissal, and, if he so requests, has been given a reasonable opportunity within fifteen days after receiving such notice to review the decision with the superintendent at which meeting such employee may be represented by an attorney or other representative to present information pertaining to the bases for the decision and to such employee's status. A principal, assistant principal, department head or other supervisor may seek review of a dismissal or demotion decision by filing a petition with the commissioner for arbitration. Except as provided herein, the procedures for arbitration, and the time allowed for the arbitrator to issue a decision, shall be the same as that in section forty-two. The commissioner shall provide the parties with the names of three arbitrators who are members of the American Arbitration

Association. The arbitrators shall be different from those developed pursuant to section forty-two. The parties each shall have the right to strike one of the three arbitrator's names if they are unable to agree upon a single arbitrator from amongst the three.

A school committee may award a contract to a superintendent of schools or a school business administrator for periods not exceeding six years which may provide for the salary, fringe benefits, and other conditions of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performance of duties or office, liability insurance, and leave for said superintendent or school business administrator. Nothing in this section shall be construed to prevent a school committee from voting to employ a superintendent of schools who has completed three or more years' service to serve at its discretion.

MASS. GEN. L. ch. 71, § 42

A principal may dismiss or demote any teacher or other person assigned full-time to the school, subject to the review and approval of the superintendent; and subject to the provisions of this section, the superintendent may dismiss any employee of the school district. In the case of an employee whose duties require him to be assigned to more than one school, and in the case of teachers who teach in more than one school, those persons shall be considered to be under the supervision of the superintendent for all decisions relating to dismissal or demotion for cause.

A teacher who has been teaching in a school system for at least ninety calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal or superintendent, as the case may be, and to present information pertaining to the basis for the decision and to the teacher's status. The teacher receiving such notice may be represented by an attorney or other representative at such a meeting with the principal or superintendent.

Teachers without professional teacher status shall otherwise be deemed employees at will.

A teacher with professional teacher status, pursuant to section forty-one, shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause.

A teacher with professional teacher status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. The commissioner shall forward to the parties a list of three arbitrators provided by the American Arbitration Association. Each person on the list shall be accredited by the National Academy of Arbitrators. The parties each shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator from amongst the three. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association to be consistent with the provisions of this section. The parties each shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator from amongst the three. The board of education shall determine the process for selecting arbitrators for the pool. The fee for the arbitration shall be split equally between the two parties involved in the arbitration.

At the arbitral hearing, the teacher and the school district may be represented by an attorney or other representative, present evidence, and call witnesses and the school district shall have the burden of proof. In determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards.

The arbitrator's decision shall be issued within one month from the completion of the arbitral hearing, unless all parties involved agree otherwise, and shall contain a detailed statement of the reasons for the decision. Upon a finding that the dismissal was improper under the standards set forth in this section, the arbitrator may award back

pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof. Under no circumstances shall the arbitrator award punitive, consequential, or nominal damages, or compensatory damages other than back pay, benefits or reinstatement. In the event the teacher is reinstated, the period between the dismissal and reinstatement shall be considered to be time served for purposes of employment. The arbitral decision shall be subject to judicial review as provided in chapter one hundred and fifty C. With the exception of other remedies provided by statute, the remedies provided hereunder shall be the exclusive remedies available to teachers for wrongful termination. The rules governing this arbitration procedure shall be the rules of the American Arbitration Association as pertains to arbitration.

Neither this section nor section forty-one shall affect the right of a superintendent to lay off teachers pursuant to reductions in force or reorganization resulting from declining enrollment or other budgetary reasons. No teacher with professional teacher status shall be laid off pursuant to a reduction in force or reorganization if there is a teacher without such status for whose position the covered employee is currently certified. No teacher with such status shall be displaced by a more senior teacher with such status in accordance with the terms of a collective bargaining agreement or otherwise unless the more senior teacher is currently qualified pursuant to section thirty-eight G for the junior teacher's position.

MASS. GEN. L. ch. 150E, § 2

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section twelve.

MASS. GEN. L. ch. 150E, § 5

The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

An employee may present a grievance to his employer and have such grievance heard without intervention by the exclusive representative of the employee organization representing said employee, provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

MASS. GEN. L. ch. 150E, § 10

(a) It shall be a prohibited practice for a public employer or its designated representative to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen to be represented by an employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six;

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine;

(b) It shall be a prohibited practice for an employee organization or its designated agent to:

(1) Interfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section six;

(3) Refuse to participate in good faith in the mediation, fact finding and arbitration procedures set forth in sections eight and nine.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
C.A. NO. 00-1367 C

DONNA SAXONIS,
PAUL SAXONIS, Plaintiffs

V.

THE CITY OF LYNN, PATRICK J. MCMANUS, MAYOR, LYNN PUBLIC SCHOOLS AND DR. JAMES MAZAREAS, SUPERINTENDENT, LYNN SCHOOL COMMITTEE MEMBERS 1996-2001, JUDITH A. FLANAGAN KENNEDY, FRANK M. CARRABBA, STEPHEN J. DUFFY, WILLIAM F. MCGUINNESS, GEORGE K. MAZAREAS, WILLIAM M. MCDONALD, TIMOTHY MCMANUS, PATRICIA M. CAPANO, DONNA M. COPPOLA, MADELYN DAY BARRY, LORETTA CUFFE-O'DONNELL, CAROLYN A. MURRAY, DR. JAMES T. LEONARD, RETIRED SUPERINTENDENT, EDWARD B. JOHNS, DEPUTY SUPERINTENDENT, PARICIA M. LIBBY, DIRECTOR OF HUMAN RESOURCES. BARTLEY J. CONLON, PRINCIPAL LVTI, ALBERT G. MALAGRIFA,
RETIRED PRINCIPAL LVTI, EVELYN G. LAZARIS, RETIRED TEACHER LVTI, LORRALNE A. LEBRUN, TEACHER LVTI, JOSEPH O'HAGAN, VICE-PRINCIPAL LVTI, JOSEPH G. GAUVAIN, PRESDENI', AND THE LYNN TEACHERS UNION LOCAL 1037, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ET AL, Defendants

COMPLAINT AND JURY CLAIM

THE PARTIES

1. Plaintiff, Donna Saxonis is a resident of 148Western Avenue, Lynn, Essex County, MA.

2. Plaintiff, Paul Saxonis, is married to Donna Saxonis and a resident of 148Western Avenue Lynn. Essex County, MA.

PAGE 4 OF COMPLAINT

INTRODUCTION

27. This action is for damages and other relief arising out of the employment and wrongful termination of the Plaintiff, Donna Saxonis, from her position as a cosmetology teacher at Lynn Vocational Institute (LVTI). The claims include: breach of employment contract, wrongful/unlawful termination, wrongful termination and civil conspiracv, intentional interference with advantageous economic and/or contractual relations, fraud/deceit, reckless and intentional infliction of emotional distress, defamation, negligent hiring, retention and supervision, false imprisonment, violation of M.G.L. c. 12, § 11I, denied be process, invasion of privacy and loss of consortium. This action is also filed to deter the Defendants and others from engaging in such wrongful activity again. Hopefully this action will cause positive changes in the management and hiring practices of the Lynn Public Schools and LVTI that will ensure qualified teachers for the children entrusted in their care.

BACKGROUND FACTS

28. The Plaintiff is a professional cosmetologist (License # 1063927), cosmetologv instructor (License # 4004401) and certified teacher (Full Vocational Technical Approval # 5025455). She operates her own fully licensed (Salon License # 25316) full service beauty salon, "Hair Design by Donna."

29. Defendants Albert G. Malagrifa, the retired LVTI Principal and Dr. James T. Leonard, the retired Superintendent were unlawfully motivated. They acted in concert without just cause to violate the contractual, statutory and constitutional rights of the Plaintiff. They did not continue the Plaintiff's employment as required by contract M.G.L. 71 §§ 41, 42 and

St. 1993, c. 7 1 § 77. They acted with extreme malice in contempt of their legal obligations, their contracts. public policy and well beyond the scope of their duties to harm the Plaintiff without just cause.

PAGE 26 OF COMPLAINT

Donna Saxonis. Mayor McManus is certainly familiar with the Massachusetts Education Reform Act of 1993 and the numerous education laws and regulations, he has been the Chairman of the School Committee for more the eight years.

186. October 12, 1997, - Plaintiff Paul Saxonis sent a letter to Defendant, Patricia Libby, the Director of Human Resources for the Lynn Public Schools, requesting a copy of policies and standards regarding integrity, interviewing and the hiring of teachers. He sent a copy of that letter to each Lynn School Committee Member.

187. October 27, 1997 - Defendant, Patricia M. Libby, the Director of Human Resources for the Lynn Public Schools, sent her response to the Plaintiff, Paul Saxonis. in which she stated, "Long term substitutes assignments are made through the personnel department, after consultation with the appropriate building administrator."

188. Ms. Libby stated in that letter that "teacher candidates do not have personnel files."

189. Ms. Libby also stated in that letter, "Please be assured that principals and other individuals involved in any District hiring process represent the professionalism expected of the District and School Committee. The Lynn School District is an Equal Opportunity employer and adheres to all Federal and state requirements in carrying out its hiring process."

LEGAL CLAIMS

COUNT I - BREACH OF EMPLOYMENT CONTRACT

190. Plaintiffs repeat and re-allege paragraphs 1 through 189 as though fully set forth herein.

191. Defendants: The City of Lynn, Mayor Patrick J. McManus, Lynn Public Schools and Dr. James T. Leonard, retired Superintendent, Edward B. Johns, Deputy Superintendent, Lynn School Committee Members Judith A. Flanagan Kennedy. Frank M. Carrabba, Stephen J. Duffy, William F. McGuinness. George K. Mazareas, William M. McDonald, Albert G. Malagrifa, retired LVTI Principal. Patricia M. Libby, Director of Human

PAGE 27 OF COMPLAINT

Resources, Joseph G. Gauvain, President and the Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO, et al

192. Mr. Malagrifa, the LVTI Principal, Dr. Leonard. the Superintendent and Mr. Gauvain, the Union President acted in concert with others to maliciously harm the Plaintiff, Donna Saxonis. The Defendants acted in bad faith without just cause to deceitfully violate the contractual, statutory and constitutional rights of the Plaintiff for illegal reasons.

193. Mr. Malagrifa and Dr. Leonard were unlawfully motivated and repeatedly abused their authority in contempt of their legal obligations. They deliberately violated public policy and numerous laws to deceitfully breach the Plaintiff's contract on three separate occasions.

194. December 3, 1996 -Mr. Malagrifa hired the Plaintiff in compliance with 603 CMR 4:10 and M.G.L. c. 74 with Dr. Leonard's approval as required by M.G.L. c. 71, § 59B, as amended by St. 1993, c. 7 1, § 53. The Plaintiff replaced Mr. Lazaris who was sick and expected to retire. The Plaintiff had already worked three years with the cosmetology students and did an excellent job. The Plaintiff closed her business to accept this position on Mr. Malagrifa's assurances

that her position would be permanent when Ms. Lazaris retired.

195. The Plaintiff was hired to teach Related Cosmetology at LVTI "until the end of the school year." Her contract as a permanent substitute teacher exceeded two hundred calendar days (approximately one hundred and twenty days in succession).

196. February 24, 1997 - Mr. Malagrifa unlawfully hired Ann Fountain to displace the Plaintiff. He deceitfully used the obsolete "Ninety Day Rule" to prevent the Plaintiff from teaching ninety days in succession.

197. Mr. Malagrifa deliberately violated his duties as a principal under the Education Reform Act of 1993 to violate public policy, M.G.L.c.112, 3 87B3, 603 CMR 4.10 (11)(12) and M.G.L. c. 74. This was the first time Mr. Malagrifa breached the Plaintiff's contract.

PAGE 28 OF COMPLAINT

198. Early March 1997 - The Union grieved the illegal employment of an unqualified "long term substitute" and demanded a certified cosmetology teacher. Mr. Gauvain knew." Mr. Malagrifa illegally hired Ann Fountain to interfere with the Plaintiffs contract.

199. March 25, 1997 - Mr. Malagrifa recalled the Plaintiff to teach "until the end of the school year." Mr. Malagrifa deceitfully assured the Plaintiff a permanent position to prevent her teaching at other schools.

200. April 8, 1997 - Mr. Malagrifa repeatedly assured the Plaintiff her position would be permanent. He ordered the Plaintiff to go for her employment physical to falsely confirm her continued employment.

201. The Plaintiff submitted her employment papers on April 9, 1997. She signed a statement, "I agree that my appointment

with the Lynn School Department is contingent upon the satisfactory completion of the physical performed by Work Well." The Plaintiff was given a copy of the City ordinance confirming she was a permanent employee of the city of Lynn. The Plaintiff filled out her personnel card. The Plaintiff completed and submitted her signed Massachusetts Teachers' Retirement Board Enrollment Form on April 9,1997.

202. April 15, 1997 -The Plaintiff successfully completed her employment physical and criminal background check (CORI) in compliance with School Department Policy for new employees. That policy states, 'The Lynn School Department strives to fill open positions with the most capable and experienced individuals." It also states, "New employees will need to provide two forms of identification, including picture identification, as required by law. The personnel office will review these requirements at the time of hire."

203. Ms. Georgia Aucone, the Personnel Manager, completed the Plaintiffs employee information and verification form.

204. On May 5, 1997 Ms. Patricia M. Libby, the Director of Human Resources completed and

PAGE 29 OF COMPLAINT

signed the employer statement on the Plaintiffs Massachusetts Teachers' Retirement Board Enrollment Form. Ms. Libby stated the length of term of the employee's contract Donna Saxonis) to be full-time for ten months starting on December 9, 1997.

205. The Plaintiff received her Union card and paid dues. She received mail addressed to Donna Saxonis - Dear Union Member - from multiple sources including the Lynn Teachers Union and the Massachusetts Federation of Teachers.

206. May 12, 1997 - Mr. Malagrifa recalled Ms. Lazaris to return without proper authorization to illegally displace the

Plaintiff. Ms. Lazaris' sleeping and poor performance continued unabated. Mr. Malagrifa did not notify the Plaintiff as required by M.G.L. c. 71, §§ 41, 42. This was the second time that Mr. Malagrifa illegally breached the Plaintiff's contract.

207. August 6, 1997 - Mr. Malagrifa told the Plaintiff he was going to pay her on a level nine and he would notify her early next week.

208. September 3, 1997 -Mr. Malagrifa did not continue the Plaintiffs employment as required by contract, M.G.L. c. 7 1, §§ 41, 42 and St. 1993,c. 7 1, § 77. Mr. Malagrifa deceitfully and outrageously breached the Plaintiffs contract for the third time.

209. Mr. Gauvain knew that Ms. Lazaris was extremely hostile. He knew about her poor performance and the circumstances that led to her involuntary leave of absence because the Union represented her. He also knew that Donna Saxonis was hired to replace her.

210. Mr. Gauvain received a three-page letter on August 27, 1997 from the Plaintiff defining everything that happened to her at LVTl including her interrogation under the ploy of an interview. Mr. Gauvain knew the Plaintiff's employment was illegally breached three times in violation of the contract.

211. Mr. Gauvain knew that Ms. Lazaris was removed because she was unfit and expected to retire. He knew that she returned to displace the Plaintiff.

PAGE 30 OF COMPLAINT

212. August 27, 1997 -Mr. Gauvain knew the Plaintiff's employment was not continued as required by contract, M G.L. c. 71, §§ 41,42, and St. 1993, c. 7 1, § 77. Mr. Gauvain also knew that an unqualified career postal worker was illegally appointed to the Plaintiffs position in violation

of School Department Policy, 603 CMR 4.10 (11)(12) and St. 1993, c. 71.

213. Mr. Gauvain outrageously defended Mr. Malagrifa, Dr. Leonard and the Lynn Public Schools. He falsely told the Plaintiff, Paul Saxonis, that Donna Saxonis had no contractual rights. He falsely cited the obsolete "Ninety Day Rule" and said there was nothing the Union could do and everything was legal.

214. Mr. Gauvain and the Lynn Teachers Union breached their duty of fair representation to the Plaintiff Donna Saxonis. Mr. Gauvain acted in bad faith and refused to help the Plaintiff.

215. On or about September 12, 1997 - Plaintiff Donna Saxonis met with Dr. Leonard, the Superintendent, to explain what happened. Dr. Leonard falsely told the Plaintiff he saw nothing wrong and assured her everything complied with School District Policies and the Education Reform Act. Dr. Leonard maliciously told the Plaintiff to meet with Mr. Malagrifa.

216. During October of 1997 the Plaintiff Paul Saxonis called every member of the Lynn School Committee to explain what happened. Every member blamed the Education Reform Act and said there was nothing they could do.

217. LVTI and the Lynn Public Schools hired the Plaintiff as a permanent employee to teach Related Cosmetology. The Plaintiff was the only qualified Related Cosmetology Teacher in the 1996-1997 school year and she did an excellent job. The Plaintiff had every right to expect her employment to be continued as required by contract, M.G.L. c. 71, §§ 41, 42, and St. 1993, c. 71, § 77.

218. The Plaintiff easily exceeded the contractual and statutory criteria for a seniority date. Neither M.G.L. c.71, § 41, nor § 42, indicates that a teacher who is dismissed (in this case

illegally) and subsequently rehired is precluded from acquiring a seniority date.

219. The Plaintiff proved herself to be an excellent Cosmetology Teacher at LVTI. She should be enjoying her fifth year as a teacher with many years until her retirement. The Defendants unlawfully and intentionally deprived a model teacher of her career to the detriment of the children entrusted in their care.

WHEREFORE, The Plaintiffs demand judgment against the defendants on each count, and demand that damages be established and Plaintiffs be awarded same, along with costs, interest, attorney's fees and other damages deemed appropriate.

COUNT II –WRONGFUL/UNLAWFUL TERMINATION

220. Plaintiffs repeat and re-allege paragraphs 1 through 219 as though fully set forth herein.

221. Defendants: The City of Lynn, Mayor Patrick J. McManus, Lynn Public Schools and Dr. James T. Leonard, retired Superintendent, Edward B. Johns, Deputy Superintendent, Lynn School Committee Members Judith A. Flanagan Kennedy, Frank M. Carrabba, Stephen J. Duffy, William F. McGuinness, George K. Mazareas, William M. McDonald, Albert G. Malagrifa, retired LVTI Principal, Patricia M. Libby, Director of Human Resources, Joseph G. Gauvain, President and the Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO, et al

222. December 3, 1996 - Mr. Malagrifa, the LVTI Principal. hired the Plaintiff, Donna Saxonis, to teach Cosmetology until the end of the school year.

223. April 15, 1997 - Mr. Malagrifa deceitfully sent the Plaintiff for her employment physical.

224. Mr. Malagrifa acted with malice in concert with others to wrongfully terminate the Plaintiff. The Plaintiffs employment was not continued as required by M.G.L. c.7 1, §§ 41, 42, and St. 1993, c. 71, § 77.

PAGE 32 OF COMPLAINT

225. Mr. Malagrifa and Dr. Leonard, the Superintendent, maliciously abused their authority to appoint an unqualified person with false credentials to the Plaintiffs position. They deliberately violated their own contracts, public policy, M.G.L. c. 74, 603 CMR 4.10 (11)(12), M.G.L. c. 71, §§ 41, 42, and St. 1993, c. 71, § 77.

226. The Defendants did not manage, prevent, or correct the obviously illegal and extremely malicious actions of Mr. Malagrifa and Dr. Leonard against the Plaintiff and the students. Instead they encouraged, approved and/or participated in their illegal conduct.

WHEREFORE, The Plaintiffs demand judgment against the defendants on each count, and demand that damages be established and Plaintiffs be awarded same, along with costs, interest, attorney's fees and other damages deemed appropriate.

COUNT III -WRONGFUL TERMINATION AND CIVIL CONSPIRACY

227. Plaintiffs repeat and re-allege paragraphs 1through 326 as though fully set forth herein.

228. Defendants: The City of Lynn, Mayor Patrick J. McManus, Lynn Public Schools and Dr. James Mazareas, Superintendent, Dr. James T. Leonard, retired Superintendent, Lynn School Committee Members Judith A. Flanagan Kennedy, Frank M. Carrabba, Stephen J. Duffy, William F. McGuinness, George K. Mazareas, William M. McDonald, Timothy McManus, Patricia M. Capano, Donna M. Coppola, Madelyn Day Barry, Loretta Cuffe, O'Donnell, Carolyn A. Murray, Edward B. Johns, Deputy

Superintendent, Patricia M. Libby, Director of Human Resources, Bartley J. Conlon, LVTI Principal, Albert G. Malagrifa, retired LVTI Principal, Evelyn G. Lazaris, retired LVTI Cosmetology Teacher, Lorraine A. LeBrun, LVTI Cosmetology Teacher, Joseph 0' Hagan, LVTI Vice-Principal, Joseph G. Gauvain, President and the Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO, et a1

THE COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
CIVIL ACTION NO:
00-1367C

DONNA SAXONIS,
PAUL SAXONIS,

Plaintiffs

v.

THE CITY OF LYNN, PATRICK J. MCMANUS, MAYOR
LYNN PUBLIC SCHOOLS, DR. JAMES MAZAREAS,
SUPERINTENDENT, LYNN SCHOOL COMMITTEE
MEMBERS 1996-2001, JUDITH A. FLANAGAN KENNEDY
FRANK M. CARRABBA, STEPHEN J. DUFFY,
WILLIAM F. MCGUINNESS, GEORGE K. MAZARESA,
WILLIAM M. MCDONALD, TIMOTHY MCMANUS,
MADELYN DAY BARRY, LORETTA CUFFE-O'DONNELL,
CAROLYN, A. MURRAY, DR. JAMES T. LEONARD,
RETIRED SUPERINTENDENT, EDWARD B. JOHNS,
DEPUTY SUPERINTENDENT, PATRICIA M. LIBBY,
DIRECTOR OF HUMAN RESOURCES,
BARTLEY J. CONLON, PRINCIPAL LTVI, ALBERT G.
MALIGRIFA, RETIRED PRINCIPAL, LTVI,
EVELYN G. LAZARIS, RETIRED TEACHER LVTI,
LORRAINE A. LEBRUN, TEACHER LTVI,
JOSEPH O'HAGAN, VICE-PRINCIPAL LTVI,
JOSEPH G. GAUVAIN, PRESIDENT, AND THE LYNN
TEACHERS UNION LOCAL 1037, AMERICAN
FEDERATION OF TEACHERS, AFL-CIO, ET AL,

Defendants

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

(1978). Due process is required where the teacher has a right to expect continued employment. See Martin v. School Committee of Natick, 395 Mass. 461 (1983). Here there is an agreement for a term. *Exh. 1, Aff of D. Saxonis.* In addition, the Plaintiff is entitled to a due process claim where the basis for the dismissal is a fabrication, arbitrary or unreasonable. See Miline v. School Committee of Manchester, 381 Mass. 581, 582 (1980). The pre-textual nature of Mrs. Saxonis' dismissal is clearly alleged. Dismissal simply cannot be used in a manner to disrupt service with the purpose of impairing contractual rights relative to seniority or tenure. Ripley v. School Committee of Norwood, 389 Mass. 610, 614 (1983). Defendants apparently agree with this principle. *Exh. 8, Union Contract.*

As to the contention of the individual Defendants, it should be noted that this Complaint contains counts for conspiracy and fraud. Given the Defendants denials, where it is established that a Defendant fraudulently induced the Plaintiff to enter into a "phantom" contract, as such Defendants are estopped from avoiding liability for damages relating to this contract.

Intentional Interference with Contract, Fraud and Civil Conspiracy:

As an initial matter, the Supreme Judicial Court has indicated that Plaintiff's position relative to seniority and her expectation of employment established damages. Owen v. Williams, 77 NE 2d 313, 320 (1948).

There is no doubt that bad faith can constitute an improper motive. So too can motivation for personal gain or other personal reasons such as dislike, malice and the like. As discussed below, there is no doubt that a supervisor or employee of the contracting party may be implicated. See e.g. Boothby v. Texon, Inc., 608 NE 2d 1028 (1993), Owen v. Williams, 77 NE 2d 313, 320 (1948), Wright & Shriners Hosp. For Crippled Children, 589 NE 2d 1241 (1992), Shea v. Emmanuel College, 682 N.E. 2d 1348 (Mass 1997).

156, 166-68, (1987). Finally, the Defendant's base claim that Donna Saxonis was not an employee at the time of the alleged interview coupled with the inapplicability of facts relating to wrongdoing, defeats any hope that the Defendants may harbor to avoid this claim.

Limitations Issues:

Plaintiffs point out that numerous and varied acts by the Defendants occurred after August 4, 1997 and were clearly part of continuing wrongful acts on the part of the Defendants. However, to the extent that the Defendants factually claim that these wrongful acts occurred exclusively prior to August 4, 1997, Plaintiffs note that the statue of limitations applicable to this contention and to all contentions where the limitations period is raised as a defense is subject to the well known discovery rule as well as applicable notice provisions (including the content and quality of said notice, where applicable). Simply put, limitations periods do not commence until the Plaintiff knew or should have known that the alleged wrong occurred. See, e.g. Wheatley v. AT&T, 418 Mass. 394 (1994) (involving age discrimination); Lindsey v. Romano, 427 Mass. 771 (1998) (providing ample citations relative to the discovery rule).

Other Issues:

Under the Massachusetts Civil Rights Act threats, intimidation, coercion as well as other forms of inappropriate overreaching, bias and mistreatment are actionable. Clearly, the Defendants recognize the interview process in this case as one of the many examples of threats, intimidation, and coercion. *Exh. 1, Aff of D. Saxonis.* As cited by the Defendant and recognized by the Court in Mullen v. Ludlow Hosp. Soc'y, 32. Mass.App.Ct. 968, 969 (1992) a "secured right" arising under the Massachusetts Civil Rights Act expressly refers to an employment agreement, written or oral, and dismisses the notion of the employee handbook as binding as it was negotiated and was received during the course of that employee's employment rather than as an inducement or condition precedent.

is tortious, co-conspirators adopt the tort as their own. It makes no different that their motivations are varied. Mrs. Lazaris, based on the materials submitted, clearly was involved in defamatory activities. That another person was motivated by concealment does not lessen his or her responsibility. Further, defamatory communications between joint actors is not privileged.

Dated: March 8, 2002

Respectfully submitted,
Donna Saxonis and Paul Saxonis
By and through their Attorney

s/_____

Lester E. Riordan III
81 Washington Street, Suite 8
Salem, MA 01970
Telephone: 1-978-744-9461
BBO #: 633725

THE COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT
CIVIL ACTION NO: 00-1367C

DONNA SAXONIS, PAUL SAXONIS,
Plaintiffs,

v.

THE CITY OF LYNN, PATRICK J. MCMANUS, MAYOR LYNN PUBLIC SCHOOLS, DR. JAMES MAZAREAS, SUPERINTENDENT, LYNN SCHOOL COMMITTEE MEMBERS 1996-2001, JUDITH A. FLANAGAN KENNEDY FRANK M. CARRABBA, STEPHEN J. DUFFY, WILLIAM F. MCGUINNESS, GEORGE K. MAZARESA, WILLIAM M. MCDONALD, TIMOTHY MCMANUS,) MADELYN DAY BARRY, LORETTA CUFFE-O'DONNELL, CAROLYN, A. MURRAY, DR. JAMES T. LEONARD, RETIRED SUPERINTENDENT, EDWARD B. JOHNS, DEPUTY SUPERINTENDENT, PATRICIA M. LIBBY, DIRECTOR OF HUMAN RESOURCES, BARTLEY J. CONLON, PRINCIPAL LTVI, ALBERT G. MALIGRIFA, RETIRED PRINCIPAL, LTVI, EVELYN G. LAZARIS, RETIRED TEACHER LVTI, LORRAINE A. LEBRUN, TEACHER LTVI, JOSEPH O'HAGAN, VICE-PRINCIPAL LTVI, JOSEPH G. GAUVAIN, PRESIDENT, AND THE LYNN TEACHERS UNION LOCAL 1037, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ET AL,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

Introduction:

On May 20, 2002, this Honorable Court allowed the Motion for Summary Judgment by Defendants, the Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO and Joseph

G. Gauvain (hereinafter, "Union Defendants").[12] In the Memorandum and Order (hereinafter "Order"), this Court finds that the Union was not bound by the duty of fair representation where Donna Saxonis was not a school employee at the time she raised her complaint to the Union. Order at 4-5.

Plaintiffs respectfully request this Court to reconsider its decision under Mass.R.Civ.P. 56(e) in that Plaintiffs adequately plead and supported the Union's breach of the duty of fair representation.

The Union admitted to requisite facts establishing both the breach and the inapplicability of a recognized defense. The only question remaining involves the existence of the breach itself. As discussed herein, this duty is clear under the law. Further, under the unique facts of this case, Plaintiffs established liability against the Union Defendants as a matter of law and pursuant to Mass.R.Civ.P. 56(c), relative to contract/breach of duty of fair representation, and respectfully state that the Union's factual and legal argument that they owe no duty to substitute teachers vitiates all defenses available to said Union. Plaintiffs also put forth sufficient evidence to support issues relating to all other counts by establishing that the Union Defendants where aware of the wrongs plead in the Plaintiffs' complaint, concealed said wrongs from the Plaintiff and mislead the Plaintiff.

Argument

The question presented to this Honorable Court is simple and direct: Did Donna Saxonis allege and support facts, if proven, that establish that the Union breached its duty of fair representation? The answer to that question is also simple and direct. Donna Saxonis alleged that "Mr. Gauvain and the Lynn Teachers' Union breached their duty of fair representation to the Plaintiff Donna Saxonis." Amended Complaint at 30, ¶ 214. Donna Saxonis also alleged that that the Union acted in bad faith, intentionally provided Donna Saxonis with false information as to her rights and conspired with the City of Lynn to defeat her rights under the collective bargaining agreement. e.g. Amended Complaint at ¶¶ 209-214, 227 *et seq.*, 257 *et seq.*, 268 *et seq.*

The next issue for this Honorable Court is whether Donna Saxonis sufficiently supported her allegations by reference to the

[12] Non-Union Defendants are collectively referred to as the City of Lynn.

record of the case. In order to establish a breach of the duty of fair representation, the Plaintiff must show that a union's actions towards an employee were arbitrary, discriminatory or in bad faith. Graham v. Quincy Food Service Employees Association and Hospital, Library and Public Employees Union, 407 Mass. 601, 606 (1990) *citing* Vaca v. Sipes, 386 U.S. 171, 190 (1967). [13]

A union breaches its duty to an employee where its refusal to pursue a grievance or complaint is improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect. Id. For instance, the "lack of a rational basis for a union decision, and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect." Id. Further, when discrimination is involved, a union's alleged good faith will not suffice to insulate it from the process of law. See Baker v. Local 2977, State Council 93, American Federation of State, County and Municipal Employees et al., 25 Mass.App.Ct. 439, 442 n.14 (1987)

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[13] The Graham case was addressed at the hearing. The Court offered the Union the opportunity to file a Supplemental Memorandum on the issue of fair representation. To date, the union has not filed such a Memorandum. It should be noted that this Court, at the hearing, indicated that it was sufficiently aware of the issues raised by the pleadings and indicated that no additional argument was necessary. The Court, however, invited argument to the extent issues where not adequately highlighted or covered in the papers. As the Court was aware, Plaintiffs' counsel was not on the brief relative to the Union motion. In addition, Plaintiffs' counsel entered the case one-week prior to filing the opposition to the City of Lynn's motion. Both motions where argued together. Plaintiff's counsel took the position that the one area that seemed to be uniformly ignored by the Defendants' motions related to the impact of the collective bargaining agreement. Plaintiff's counsel, as discussed herein, argued that (1) the express terms of this agreement protected the Plaintiff from discharge in February, 1997 under the facts at bar; and (2) established a seniority right that mandated an offer of a teaching position to the Plaintiff in the following summer. Plaintiffs' counsel also alternatively argued that the collective bargaining agreement created a contractual duty of fair representation under third party beneficiary status. The Court, in fact, apparently accepted the application of contract theory if the Plaintiff can establish that she is an intended beneficiary at the time a grievance arises. In any event, under no circumstances has Plaintiff waived its core theory, based on ¶ 214 of the Amended Complaint, that the Union breached its duty of fair representation. Plaintiff continues to contend that this claim sounds under statutory dictate, see G.L.c.150E, contract, tort, malpractice, fiduciary and constitutional principals. See cases discussed *infra*.

citing Carbone v. School Comm. of Medford, 12 Mass.App.Ct. 948 (1981).

It is clearly a prohibited practice - a breach in the duty of fair representation - for a union to refuse to participate in good faith in the mediation, fact finding and arbitration of a claim. Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 341 (1987) citing G.L. c.150E, §109(b). That the duty is outlined in a statute presents no problems of pleading nor is the statute, itself, controlling to limit judicial relief. See Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 347-348 (1987). Because of the importance of rights given up by employees in the collective bargaining process, constitutional protections are implicated without the duty of fair representation. Id. The Court's infer this duty as a constitutional requirement. Id.

In this light, the Union's bald position that "substitute teachers" have no rights misleads this Court. See *Gauvain Deposition* at 29 and 40-41. In addition, the Court has clearly stated that liability exists where the union fails to assist an employee relative to a complaint. Graham v. Quincy Food Service Employees Association and Hospital, Library and Public Employees Union, 407 Mass. 601, 608 (1990). It is simply not necessary that an employee request the union to process of grievance. Id. It is enough that the employee merely asks for help. Id. In addition, the union's duty arises where it has sufficient knowledge, but the employee is unaware of an employer's improper act. See Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 341, 354 (1987).

As to the Union's knowledge of the Plaintiffs' claims, there is no doubt whatsoever that the Donna Saxonis asserted at least three sources of knowledge as to the claim. First, Plaintiffs uncovered a letter establishing that the Union took steps, shortly after Donna Saxonis was discharged, to ensure that Defendant Malagrifia would cease his practice of discharging substitutes solely to interfere with their seniority rights and expectation under the contract. Gauvain Letter, May 1, 1997. The Union has denied that the meeting referred to in the letter was directly related to Donna Saxonis' situation. Gauvain Deposition generally and at 17 and 31. The Union acknowledges that noting was done on Mrs. Saxonis' behalf. Further, the Union did not notify Mrs. Saxonis relative to her rights.

The meeting was contemporaneous to Donna Saxonis' discharge. The contents of the letter reflect a factual pattern almost identical to Mrs. Saxonis' predicament. Perhaps more dispositive, the Union failed to identify any other employee discharged under the facts discussed in the correspondence. Id. In any event, the letter creates a sufficient inference and proof to render the question triable by a jury.

The Union also concedes, Plaintiffs' husband communicated directly with Defendant Gauvain regarding the requisite facts. See Union's Answer at 8. Finally, Plaintiffs, via Affidavit, asserted that they delivered to Gauvain a letter expressly outlining the facts relative to the Plaintiffs claim. See Answer at 8 and Aff. of D. Saxonis.

As to the Plaintiffs claims, and the Union's knowledge thereof, the plaintiff need only show that her complaint against the employer is "*arguably* meritorious." Graham v. Quincy Food Service Employees Association and Hospital, Library and Public Employees Union, 407 Mass. 601, 607 (1990). The Supreme Judicial Court has historically embraced cases finding the breach of the duty of fair representation where the union has failed to pursue non-frivolous claims. Graham v. Quincy Food Service Employees Association and Hospital, Library and Public Employees Union, 407 Mass. 601, 607 (1990) *favorably citing* San Francisco Web Pressman and Platemakers' Union v. NLRB, 794 F.2d 420 (9th Cir. 1986). Clearly, the Supreme Judicial Court views summary judgment in favor of the union as inappropriate where the union refuses to pursue an "*arguably* meritorious" claim. Graham v. Quincy Food Service Employees Association and Hospital, Library and Public Employees Union, 407 Mass. 601, 607 (1990) *favorably citing* Zimmerman v. Foundation of the French int'l School Rochambeau of Washington, 830 F.2d 1316 (4th Cir. 1986); see also Trinque v. Mount Wachusett Community College, 14 Mass.App.Ct. 191 (1982) (indicating that a jury should weigh the Plaintiff's case where the Union has established a viable factual defense).

In this case, there is no doubt that the Plaintiffs raised the following claims: (1) Donna Saxonis was not paid for at least four days for work performed between December and February, 1997; (2) Donna Saxonis did not receive full retroactive pay, as required by the contract, for work performed between December and February, 1997; (3) Donna Saxonis received clearly inadequate base pay given

her certification and level of experience as mandated by the contract; (4) Donna Saxonis was wrongfully discharged in February, 1997; and (5) Donna Saxonis was entitled to an offer of the vacant teaching position given her seniority rights. See Plaintiffs' Opposition and exhibits attached thereto.

As an initial matter, the collective bargaining agreement governs the terms and conditions of the plaintiffs' employment. Lynn Teacher's Union Local 1037, et al. v. Massachusetts Comm. Against Discrimination, 406 Mass. 516, 518 (1990). This Court has recognized the agreement as the source of the City of Lynn's clear liability and the Union's knowledge thereof by reference to the collective bargaining agreement. As discussed below, the Court's difficulty appears to lie with the fact that Donna Saxonis was a terminated employee at the time she complained to the Union. While this may present a conceptual difficulty where earned rights arise after discharge, to limit recovery would bar fair representation to all wrongfully discharged employees. Clearly the case law establishes that discharged employees may pursue fair representation claims. e.g. Trinque v. Mount Wachusett Community College, 14 Mass.App.Ct. 191 (1982). (indicating that the union made inadequate and perfunctory investigation of complaints by discharged employees).

In this regard, the courts have stated that, "[i]t was anticipated. . . that the contractual machinery would operate with some minimum levels of integrity." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) *cited by* Trinque v. Mount Wachusett Community College, 14 Mass.App.Ct. 191 (1982). The main source of Donna Saxonis' claim - the intentional impairment of her seniority - highlights these judicial concerns. In the first instance, the miscalculation of the plaintiff's seniority is an ongoing harm. e.g., Graham v. Quincy Food Service Employees Association and Hospital, Library and Public Employees Union, 407 Mass. 601, 608 (1990), Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 341, 354 (1987). As these Union Defendants well know from their historical complicity in fostering "illegal" breaks in seniority rights, "[a] seniority system which is so facially neutral that it ignores prior discriminatory acts against its members, to the detriment of those members, provides a ready vehicle for application of the continuing violation rule." Lynn Teacher's Union Local 1037, et al. v. Massachusetts Comm. Against

Discrimination, 406 Mass. 516, 522 (1990). At the Supreme Judicial Court has found regarding this very Union, the Union's historical perspective "breathes new life into a concededly illegal policy." Id. at 523.

A review of the key provisions of this agreement, with applicable facts, is therefore in order. As the Court has stated, a substitute teacher on a long-term assignment is both a "teacher" as defined by the contract and a member of the collective bargaining agreement. Order, Contract at 7. A substitute teacher on a long-term assignment refers to a substitute who has served for twenty consecutive days. Order, Contract at 8. As this Honorable Court acknowledged, Donna Saxonis qualified as a long-term substitute given her service from December through February, 1997. Order. [14]

The Union is the sole and exclusive bargaining agent for long term substitutes under the express terms of the contract. Order, Contract at 7. As such, the Union is bound by its duty of fair representation. *See cases cited herein.* Long-term substitute status also qualifies the teacher for the various benefits under the collective bargaining agreement as a member of the bargaining unit. See Contract at 7.

The applicable benefits, for purposes of this motion, are as follows: Long-term substitutes, as teachers, are entitled to retroactive pay in accordance with the established schedule determined relative to experience, education and certification. Contract at 10 and 12. Long-term substitutes, as teachers, are entitled to advance notice of termination. Contract at 25. Long-term substitutes, as teachers, are entitled to priority in their positions, regardless of seniority, based on time of service and certification. See Contract at 27-28. The school is prohibited from terminating a long-term substitute solely to "deprive the bargaining member of professional status or other rights to continued employment." Contract at 29. The Contract clearly prohibits the replacement of a current teacher with a less qualified teacher where certification is at issue. Contract at 29. Further, whenever "administratively possible, teachers shall be assigned to teach in their area of certification." Contract at 46. Both the Union and the school department

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[14] As this Court has also stated, Donna Saxonis also served as a long-term substitute from March through May, 1997.

independently verified that the Contract means what it says - that an employee's position may not be terminated to impair seniority credits. Gauvain Letter, May 1, 1997.

The following is not in dispute: Donna Saxonis was a long-term substitute at the time of her termination in February, 1997. Order. Donna Saxonis was replaced without reasonable notice and contrary to promises made to her by her department head. Aff. of J. Whyte. Mrs. Saxonis' department head had authority to hire Mrs. Saxonis until the end of the school year. Contract, Aff. of J. Whyte. Donna Saxonis was replaced by an unqualified teacher. Aff. of P. Saxonis item 14. The collective bargaining agreement prohibited the replacement of Donna Saxonis under the facts. Contract at 27 *et seq.* The purpose of the replacement was to impair Donna Saxonis' seniority. Gauvain Letter of May 1, 1997. No Defendant has established a justifiable basis for such replacement. Had Mrs. Saxonis been allowed to complete her assignment as established under the promises made to her and the protections created under the Contract, Mrs. Saxonis would have achieved retroactive seniority. Contract at 27 *et seq.* On achieving seniority, and under the facts of this case, the city of Lynn was required to offer the vacant teaching position to Donna Saxonis. Id. The Union was aware of all requisite facts relating to the City of Lynn's violation of the employment agreement, including the rights contained within the collective bargaining agreement. Union's Answer at 8 and Gauvain Letter of May 1, 1997.

Note also that a "grievance" refers to a complaint by an employee, oral or written. Failure to grieve within the time frame set-forth in the agreement is not fatal to the grievance or an independent cause of action. Contract at 47 *et seq.* The contract establishes that an employee may grieve outside of the time limits established by the contract. Contract at 47 *et seq.* The time considerations only become dispositive if the employee grieves, but fails to pursue the case. Contract at 47 *et seq.* However, a grievance is not mandatory. The contract expressly states that an employee may grieve, but there is no requirement to do so. Contract at 47 *et seq.* In this case, Donna Saxonis made a grievance, but eventually pursued a private action where it became clear that the City of Lynn had no intention of entering a decision and where the facts suggested

that the City and the Union were in collusion.[15] The law clearly allows a private right of action against both the Union and the employer under these circumstances.

The Union has raised no viable defense relative to the standard set-forth by the Supreme Judicial Court. In fact, the Union's owns statements vitiate any such defense given their bald and knowingly incorrect statement that they owe no duty to represent "substitute teachers." As this Court acknowledges, this clearly is contrary to the express terms of the collective bargaining agreement. Further, as the Plaintiffs have alleged and as experience shows, the Union was keenly aware of its duty and obligation in this regard. The Union's only contention is that the action must be dismissed simply because it is not Donna Saxonis' employer. This defense plainly seeks to craft a technical advantage based on the placement of Plaintiffs' allegation relating to the duty of fair representation in the context of its breach of contract claim. See Amended Complaint at 30, ¶ 214. This defense simply ignores the dictates of case law, embodied by Mass.R.Civ.P. 2, which states that there shall be one cause of action.

In any event, the Plaintiffs have no obligation to counter a facially deficient motion. See Mass.R.Civ.P. 56. The law is clear. The Union carries the burden on summary judgment. Id. Plaintiffs' respectfully submit that the Court's order effectively shifts this burden and ignores the ample proof produce. Simply put, there is not a grain of substance in the Union's papers which challenges the Plaintiff's allegations, let alone proof. In fact, as previously discussed, given the clear breach of the part of the City of Lynn; the Union's clear knowledge of that breach; the Union's refusal to act upon that breach and the Union's claim that substitute teachers are entitled to no representation, the Union's liability has arguably been established under the summary judgment standards and the requirements of Mass.R.Civ.P. 56(c).

Note also that Donna Saxonis' complaint sounds in discrimination relative to her age, sex and status as a substitute teacher. Clearly, the Union understood this aspect of the complaint. For instance, discriminatory intent is shown from the "mere fact of

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[15] Donna Saxonis made a grievance to Superintendent Leonard in September, 1997. Under the contract, the grievance period was tolled until Leonard issued a written finding. There is no dispute that Leonard failed to make findings.

differences in treatment." Lynn Teacher's Union Local 1037, et al. v. Massachusetts Comm. Against Discrimination, 406 Mass. 516, 527 (1990). There is no doubt, in this case, that two individuals hired for the same position, with less experience and without proper certification, were paid at substantial higher rates than Donna Saxonis, despite the requirement in the contract that substitute teacher pay is calculated according to experience and certification.

As discussed above, the Union's position that the contract does not benefit Donna Saxonis because she was not an employee at the time of her complaint is without merit and largely dealt with by reference to the cases, as discussed supra, where terminated employees where entitled to Union representation. To hold so ignores that fact that certification and seniority rights, assuming good faith on the part of the school officials, gives rise to recall rights. See Contract at 27 et seq. The cases cited by the Court hold no different.

In this case, there is no dispute that Donna Saxonis was owed a contractual duty by the City of Lynn. Clearly Mrs. Saxonis performed under the contract. As this court recognizes, she was vested as a member of the bargaining unit pursuant to the express terms of the contract. She was bound to accept the Union as her representative under law. The Union, given its legal monopoly on representation, owed her a well-known duty set forth under statute and legal, equitable and constitutional principals. The contract was negotiated to protect employees of the school system. Donna Saxonis was such an employee and is clearly an intended beneficiary to the extent her rights and the related harm arise from those benefits.

Although the Union ignored the variety of claims relating to collusion and conspiracy, the Court's Order appears to allow the motion to all counts. Clarification is required. In any event, Plaintiffs have put forth sufficient evidence to support issues relating to all non-contractual counts by establishing that the Union Defendants where aware of the wrongs plead in the Plaintiffs' complaint and concealed said wrongs from the Plaintiff. Defendant Gauvain's letter of May 1, 1997 taken together with the affidavits on file in this matter is sufficient to support these claims. In addition to the representation issues, the jury should be permitted to weigh facts relative to disclosure duties and fraud that suggest that the Union actively concealed information from Donna Saxonis to discourage

the filing of a claim. The facts also suggest that the Union intentionally mislead Mrs. Saxonis regarding her rights under the collective bargaining agreement. The facts suggest an agreement between Malagrifia and the Union in this regard.

In conclusion, the Plaintiffs request that this Honorable Court reconsider its Order dated May 20, 2002 granting Summary Judgment to the Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO and Joseph G. Gauvain (hereinafter "Union Defendants") and enter an Order denying said Defendants' Motion for Summary Judgment as to all counts and/or enter an Order granting Plaintiffs Summary Judgment pursuant to Mass.R.Civ.P. 56(c), as to Plaintiffs' contract claims relative to contract/breach of duty of fair representation. In the alternative, if this Court finds that said fair representation claim is improperly plead, the Plaintiffs request leave to amend the pleading's to expressly state a cause of action under G.L.c.150E in that Plaintiffs have alleged sufficient facts to support such a claim in their pleading.

Respectfully Submitted,
Donna Linda Saxonis and
Paul Saxonis
By their Attorney

s/_____
Lester E. Riordan III
81 Washington Street, Suite Eight
Salem, Massachusetts 01970
Phone: (978) 744-9461
BBO No. 633725

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT C.A. No. 00-1367 C

DONNA SAXONIS
PAUL SAXONIS
Plaintiffs

V.

THE CITY OF LYNN, ET AL
Defendants

GENUINE ISSUES OF MATERIAL FACT
THAT SHOULD BE DETERMINED BY A JURY
INTRODUCTION

Plaintiff Donna Saxonis was wrongfully deprived of her continued employment as a cosmetology teacher after she was hired by the Lynn Public Schools and became a dues-paying member of the Lynn Teachers Union Local 1037. The Plaintiffs maintain that the Defendants could not have successfully deprived Donna Saxonis from her teaching career and denied her due process without the full cooperation and support of the Codefendants, the Lynn Teachers Union Local 1037, AFT, AFL-CIO, and Joseph G. Gauvain, President of the Lynn Teachers Union Local 1037. Defendant Joseph G. Gauvain knew there was unlawful conduct against Plaintiff Donna Saxonis. Instead of representing her, he willfully conspired with others to deceive and mislead the Plaintiffs. Defendant Joseph G. Gauvain refused to help Plaintiff Donna Saxonis, he said she was not entitled to legal protection from the Lynn Teachers Union because she had no contractual rights.

1. Defendant Joseph G. Gauvain (Defendant Gauvain) was the President of the Lynn Teachers Union Local 1037, AFT, AFL-

CIO (Union) from June of 1974 through June of 1978, and June of 1980 through June 6, 2001. (See Deposition of Joseph G. Gauvain page 7 lines 16-24 and page 8 lines 1-8, Exhibit 1).

2. Plaintiff Donna Saxonis (Plaintiff Ms. Saxonis) is a multi-licensed professional cosmetologist and fully certified cosmetology teacher with impeccable credentials. Her Cosmetology Licenses, - Teacher Certification, experience and continuous work history are well documented in numerous public records that clearly substantiate her credentials are complete and legitimate. (See Massachusetts Division of Professional Licensure Information and Department of Education Full Vocational Approval (full certification) for Donna Saxonis attached — Exhibit 2).

3. Plaintiff Ms. Saxonis was a member of the School Advisory Board and worked for three years as a volunteer and substitute teacher at Lynn Vocational Technical Institute (LVTI) with excellent performance. On December 3, 1996 she was hired to teach Related Cosmetology at LVTI "until the end of the school year." Her Long-term assignment exceeded 200 calendar days (120 school days). She was hired to replace Defendant Ms. Lazaris who was involuntarily removed and expected to retire. Plaintiff Ms. Saxonis closed her business to accept this position with the understanding it would be permanent. (See Complaint and Jury Demand, attached — Exhibit 3).

4. Despite Plaintiff Ms. Saxonis's excellent performance and her positive influence on her students the Principal of LVTI, Defendant Albert G. Malagrifa (Defendant Malagrifa), unlawfully hired an unqualified person on February 24, 1997 to displace Plaintiff Ms. Saxonis for 30 days. He did this to prevent Plaintiff Ms. Saxonis from establishing her seniority date by teaching ninety days in succession. (See Agreement between the School Committee City of Lynn and the Lynn Teachers Union Local 1037, AFT, AFL-CIO *1995-1997* (Contract) attached - Exhibit 4, see page l2par.2).

5. Defendant Malagrifa violated his duties as a principal under the Education Reform Act to violate public policy, M.G.L. c.1 12, § 87BB, 603 CMR 4.10 (11)(l2) and M.G.L. c. 74. This was the

first time Defendant Malagrifa breached Plaintiff Ms. Saxonis's Contract.

6. In March of 1997 the Union grieved the illegal employment of an unqualified "long term substitute" and demanded a certified cosmetology teacher. (See Affidavit of Paul Saxonis's meeting with LVTI Union Representative Roland St. Pierre — Exhibit 5).

7. In response to that Union grievance Defendant Malagrifa removed the unqualified person. On March *25,* 1997 Defendant Malagrifa recalled Plaintiff Ms. Saxonis to teach "until the end of the school year." Defendant Malagrifa again deceitfully assured Plaintiff Ms. Saxonis that her position would be permanent to prevent her from teaching at other schools.

8. Defendant Gauvain was aware that Defendant Malagrifa unlawfully interrupted Plaintiff Ms. Saxonis's continuous employment to prevent her seniority date. (See Lynn Teachers Union Letter of May 1, 1997 from Defendant Gauvain to Defendant Malagrifa attached - Exhibit 6).

9. Defendant Gauvain stated he did not recall Plaintiff Ms. Saxonis's letter to him on
August 27, 1997. (See Deposition of Defendant Gauvain, page 10 lines 9-24 and Plaintiff Ms.
Saxonis's letter of August 27, 1997 attached — Exhibit 7).

10. Defendant Gauvain did not recall and denied his phone conversations on August 27, 1997 with Plaintiff Paul Saxonis. (See Deposition of Defendant Gauvain, page 10 lines 9-24, page 11 lines 1-3, page 44 line 24 and page *45* lines 1-4 attached — Exhibit 8). (See AFFIDAVIT OF JOHN KINGSTON attached —Exhibit 9). (See CERTIFICATE OF AUTHENTICITY attached -Exhibit 10).

11. Defendant Malagrifa repeatedly assured Plaintiff Ms. Saxonis that her position would be permanent. On April 8, 1997 Plaintiff Ms. Saxonis was ordered to go to the Administration Building to fill out her employment papers for the following year. She was further assured that she was permanently hired when she

given an appointment for her employment physical with a copy of the City Ordinance for pre-employment physical examinations for employees of the City of Lynn. (See Lynn Public Schools Contingent Agreement for physicals - City of Lynn Ordinance - Employment Exam Report of Findings attached - Exhibit 11).

12. Defendant Malagrifa confirmed Plaintiff Ms. Saxonis's employment would be permanent as employment physicals are given when a person or employee is permanently hired. All employment physicals must be approved and ordered by Dr. James T. Leonard, Superintendent of the Lynn Public Schools (Defendant Dr. Leonard). (See Deposition of Patricia Libby Vol. 1 page 37 lines 20—24 and page 38 lines 1-24 — Exhibit 12).

13. Defendant Gauvain stated he had no idea when an employee was sent for a physical and he did not know if an employment physical was an offer of employment. (See Deposition of Defendant Gauvain, page 37 lines 2-8 attached - Exhibit 13).

14. Plaintiff Ms. Saxonis submitted her employment papers on Wednesday April 9, 1997.Union dues were deducted from her paycheck in the week ending on April 12, 1997. (See Plaintiff Ms. Saxonis's pay receipt attached —Exhibit 14).

15. Plaintiff Ms. Saxonis completed her Massachusetts Teachers Retirement Board Enrollment Form on April 9, 1997. On May *5,* 1997 Ms. Patricia M. Libby, the Director of Human Resources and Personnel (Defendant Ms. Libby) completed and signed the employer statement on that form. Defendant Ms. Libby stated the length of term of the employee's contract (Plaintiff Ms. Saxonis) to be full-time for ten months. (See Plaintiff Ms. Saxonis's Employment papers and contract signed by Defendant Ms. Libby - Exhibit *15).*

16. Plaintiff Ms. Saxonis received her Union card and paid dues. She received mail addressed to Donna Saxonis - Dear Union Member - from multiple sources including the Lynn Teachers Union and the Massachusetts Federation of Teachers. (See Exhibit 16).

17. Plaintiff Ms. Saxonis was hired by Defendant Malagrifa in compliance with 603 CMR 4:10 and M.G.L. c. 74 with Defendant Dr. Leonard's approval as required by M.G.L. c. 71, § 59B, as amended by St. 1993, c. 71, § *53*.

18. On May 12, 1997 Defendant Malagrifa allowed Defendant Ms. Lazaris to return. Her sleeping in class and poor performance continued unabated. She was extremely hostile to Plaintiff Ms. Saxonis. Defendant Malagrifa never notified the Plaintiff Ms. Saxonis that she was terminated in accordance with the policies and practices of the Lynn Public Schools and as required by M.G.L. c. 71, § 41& 42. This was the second time Defendant Malagrifa illegally breached Plaintiff Ms. Saxonis's Contract.

19. Plaintiff Ms. Saxonis was invited to attend a meeting on August 6, 1997 at LVTI with Defendant Malagrifa. She attended that meeting expecting to be welcomed to LVTI for the new school year. Instead, she was interrogated for *45* minutes under the pretext of being interviewed for the position she was already hired for. Defendant Malagrifa deceitfully told her that he was going to pay her on a level nine and he would notify her early next week; he never notified her.

20. On August 27, 1997 a friend told Plaintiff Ms. Saxonis that Mr. Malagrifa appointed a postal worker to her position at LVTI. The Plaintiffs called Defendant Gauvain immediately. Defendant Gauvain knew the Plaintiff Ms. Saxonis's employment was not continued as required by Contract, M.G.L. c. 71, § 41, 42, and St. 1993, c. 71, § 77. Defendant Gauvain also knew that an unqualified career postal worker was illegally appointed to the Plaintiff Ms. Saxonis's teaching position in violation of School Department Policy and 603 CMR 4.10 (11)(12). (See M.G.L. c. 71, § 41,42, and St. 1993, c. 71, § 77 and 603 CMR 4.10 (11)(12). attached—Exhibit 17).

21. Defendant Gauvain received a three-page letter on August 27, 1997 from the Plaintiffs defining what happened to Plaintiff Ms. Saxonis at LVTI including her staged interview. Defendants Malagrifa and Dr. Leonard defiantly violated Plaintiff

Ms. Saxonis's contractual, statutory and constitutional rights to unlawfully appoint another person to her teaching position.

22. Defendant Gauvain knew Plaintiff Ms. Saxonis was treated maliciously and her employment was illegally breached three times. Defendant Gauvain was asked if Plaintiff Ms. Saxonis was treated fairly when her seniority was interrupted with an unqualified person. Defendant Gauvain said that was a very serious Statement. (See Deposition of Defendant Gauvain, page 44 lines 14-23 attached — Exhibit 8).

23. The person appointed to Plaintiff Ms. Saxonis's teaching position was not qualified. She presented obviously false credentials that are legally impossible and can not be substantiated by public records. Defendant Gauvain violated his legal obligations by not conducting a diligent inquiry on behalf of Union Member Plaintiff Ms. Saxonis.

24. On September 3, 1997 Defendant Malagrifa did not continue Plaintiff Ms. Saxonis's employment as required by Contract, M.G.L. c. 71, § 41,42 and St. 1993, c. 71, § 77. He deceitfully and outrageously breached the Plaintiff Ms. Saxonis's Contract for the third time.

25. On or about September 12, 1997 - Plaintiff Ms. Saxonis met with Defendant Dr. Leonard, the Superintendent, for 45 minutes to explain what happened. Defendant Dr. Leonard falsely told the Plaintiff Ms. Saxonis that he saw nothing wrong and assured her everything complied with School District Policies and the Education Reform Act.

26. Defendant Gauvain vigorously defended Defendant Malagrifa, Defendant Dr. Leonard and the Lynn Public Schools. He falsely told Plaintiff Paul Saxonis, that Plaintiff Ms. Saxonis had no contractual rights. He falsely cited the obsolete "Ninety Day Rule" and said there was nothing the Union could do and everything was legal.

27. Defendant Gauvain, Defendant Malagrifa and Defendant Dr. Leonard acted in concert to terminate Plaintiff Ms. Saxonis's

seniority rights by altering the terms of the collective bargaining agreement between the School Committee the Union. (See Agreement between the School Committee City of Lynn and the Lynn Teachers Union Local 1037, AFT, AFL-CIO 1995-1997 (hereinafter, Contract) (attached - Exhibit 2 - page 12). Said Union Contract states "Long-term substitutes shall not receive a seniority date until he/she has been teaching 90 days in succession and at that time his/her seniority date shall be deemed retroactive to the first day of said 90 day period." Said Union Contract is superceded by the Massachusetts Education Reform Act Of 1993 c. 71 §77, requires M.G.L. c. 71 § 42 that states as follows: "A teacher who has been teaching in a school system for art least 90 calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal or superintendent, as the case may be, and to present information pertaining to the basis for the decision and to the teacher's status." (See attached - Exhibit 17).

28. Despite her interrupted service Plaintiff Ms. Saxonis still exceeded the requirements of the Education Reform Act. Plaintiff Ms. Saxonis was never given a notice of termination. (See Defendant Libby's letter of March 20, 2000. attached - Exhibit 18).

29. Plaintiff Ms. Saxonis easily exceeded the contractual and statutory criteria for a seniority date. Neither M.G.L. c. 71, § 41, nor § 42 indicates that a teacher who is laid off (in this case illegally) and subsequently recalled is precluded from acquiring a seniority date.

30. Plaintiff Ms. Saxonis would have worked over 200 calendar days (120 school days) during the 1996-1997 school year if Defendants Malagrifa and Dr. Leonard did not unlawfully interfere with her employment. Plaintiff Ms. Saxonis was the only qualified teacher that taught Related Cosmetology in LVTI during the 1996-1997 school year and she did an excellent job. Plaintiff Ms. Saxonis had every right to expect her employment to be continued as

required by Contract, M.G.L. c. 71, § 41, 42, and St. 1993, c. 71, § 77. (See Exhibit 17).

31. Defendant Gauvain knew a career postal worker was appointed to teach Cosmetology, that fact alone prevented her appointment as proscribed by 603 CMR 4.10(11)(12). (See Exhibit 17).

32. The Defendants are currently or formerly in the most important positions of public trust in our society, the education of our children. They refused to honor and guard that trust. Defendant Gauvain conspired with defendants Malagrifa and Dr. Leonard and others to promote conduct that maliciously destroyed Plaintiff Ms. Saxonis's teaching career.

33. Defendants Gauvain, Malagrifa and Dr. Leonard acted in concert with others to deceitfully terminate Plaintiff Ms. Saxonis without just cause. They intentionally manipulated her personal life, her business and her Contract to destroy her teaching career, her livelihood and her reputation. Defendant Gauvain provoked this lawsuit by refusing to help Plaintiff Ms. Saxonis who should be in her sixth year as a teacher in LVTI.

34. Defendant Gauvain provoked this lawsuit by refusing to help Plaintiff Ms. Saxonis who should be teaching her sixth year in LVTI. His conduct was deliberate and malicious.

35. Defendant Paul Saxonis is also a victim of Defendant Gauvain's abusive conduct. (See Defendant Paul Saxonis's letter of February *5,* 1999 to Defendant Gauvain - Exhibit 19).

CONCLUSION

Plaintiff Ms. Saxonis was publicly humiliated, denied due process and permanently blacklisted from her teaching career for unlawful reasons that were completely out of her control. The Defendants' concerted actions were unjust and extremely malicious to Plaintiff Ms. Saxonis. Defendant Gauvain willfully allowed her teaching position to be given to an unqualified person known to have false credentials. Defendant Gauvain could have resolved this matter

with a phone call. Instead, he actively participated in a cover-up that breached his duty of fair representation to Plaintiff Ms. Saxonis. He did not conduct a diligent inquiry and he refused to represent her. Plaintiff Ms. Saxonis should be enjoying her sixth year as a dedicated teacher with many years until her retirement. For all of the above stated genuine issues of material fact Summary Judgment should be denied.

WHEREFORE, the Plaintiffs Donna Saxonis and Paul Saxonis respectfully request the Motion For Summary Judgment be denied. Plaintiffs respectfully request a hearing on the motion.

Respectfully submitted,
By the Plaintiffs,

s/_____

Donna Saxonis, Pro Se
148 Western Avenue,
Lynn, MA 01904-2742
Tel: (781)581-6132

s/_____

Paul Saxonis, Pro Se
148 Western Avenue,
Lynn, MA 01904-2742
Tel: (781)581-6132

Dated: January 19, 2002

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO: A.C.-2002-P-1350
APPEAL FROM THE SUPERIOR COURT, ESSEX, SS

SAXONIS, ET AL.,

V.

LYNN TEACHERS UNION LOCAL 1037, ET AL.,

BRIEF FOR APPELLANT

PAUL SAXONIS, APPELLANT
DONNA SAXONIS, APPELLANT
BY AND THROUGH THEIR ATTORNEY
LESTER E. RIORDAN III
81 WASHINGTON STREET STE 8
SALEM, MA 01970
(978) 825-1300
B.B.O #663725

rule. A. 41-42. Under the antiquated versions of this rule, and as cited by the Trial Court, "[e]mployment at-will is terminable by either the employee or the employer without notice, for almost any reason or no reason at all." Id. *citing* Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8, 9 (1988).

However, the Court ignores each and every protection afforded to Donna Saxonis under the Contract, school policies and the law. See A. 42. This is tantamount to allowing the school administration to repudiate every agreement they make, fraudulently induce teachers to enter into phantom agreements and engage in acts of bad faith with impunity. This is not mere conjecture, because that is what has been alleged and supported here. See A. 75; A. 66. The Trial Court has simply staked out a position that the statutory at-will employee rule sanctions almost any conduct on the part of the school administration regardless of their commitments, the reliance of others and basic notions of fair dealing and integrity.

B. THE COLLECTIVE BARGAINING AGREEMENT AND SCHOOL POLICIES

The Collective Bargaining Agreement (the "Contract") mandates that a substitute teacher becomes a "substitute teacher on a long-term assignment" after the "completion of twenty (20) consecutive school days

in one assignment." E.V. 14; A. 61. Employment of substitutes is primarily the responsibility of the administration, but may be delegated to department heads. E.V. 25. Ms. Whyte indicated that the hiring of Donna Saxonis for the entire school year was delegated to her by Malagrifa. A. 66.

Note also that long-term substitute status and certain associated benefits are retroactive benefits to the first day of employment for that assignment. E.V. 18 and 288. The parties agree and the trial court found that the retroactive date is at least December 5, 1996. A. 39; A. 159; A. 208; see E.V. 1-3.

Article I of the contract states that the Union is the exclusive bargaining representative for teachers, including "substitute teachers on a long term assignment." E.V. 13. "Teacher," means a "person employed by the Committee in the bargaining unit." Id.

Long-term substitutes are paid in accordance with the pay schedule established by the School Committee after "consideration of the substitutes training and experience." E.V. 18. The Contract states that members of the bargaining unit shall be placed on the salary schedule at a step appropriate for training and creditable years of experience. E.V. 20.

Long-term substitutes receive a seniority date, retroactive to the first day, after teaching ninety

PAGE 18 OF BRIEF

(90) days in succession. E.V. 18. The Contract indicates that members of the bargaining unit shall have job preference on all teaching positions beyond the regular school day or school year. E.V. 20. On site teachers shall have first priority for teaching positions designated for that specific school population. Id. Seniority based on consecutive years of experience in the Lynn School Department, certification and the ability to perform governs all assignments. Id.

The Contract indicates that when members of the bargaining unit are terminated, thirty (30) days written notification is required. Id. There is no dispute that Mrs. Saxonis never received notice relative to either one of her terminations. A. 187.

The Contract establishes the requirement to keep members of the bargaining unit in place unless there is a basis for removal. See e.g. E.V. 33. The Contract justifies termination, removal or layoff of non-tenured teachers based on performance, the termination of a position, a substantial decrease in enrollment, funding cutbacks and/or program reductions. Id. The Contract recites that, "[t]he provisions of [Article V of the Contract] shall not be construed to permit transfers or layoffs which would

PAGE 19 OF BRIEF

(1) deprive any bargaining unit member of professional status or other rights to continued employment [or] result in the assignment of

a teacher to a position to which requires special qualifications which the teacher does not possess." E.V. 35. The Contract also notes that a member on lay-off shall have preference in the employment of day to day substitutes and substitutes on a long-term assignment." E.V. 34.

A grievance is defined as a "complaint." A. 53. There is no requirement that the complaint be in writing. Id. The time limits are not rigid if there is a reasonable excuse for delay. A. 56-57. Further, the contract incorporates a discovery rule. Id. The School Manual underscores this text. For instance, substitutes are hired in the following order: (a) certified in area; (b) certified as a teacher; (c) undergraduate and (d) associate degrees, but "only in an emergency." A. 237; see A. 235.

C. DISCUSSION OF AUTHORITIES AND ARGUMENT

As Donna Saxonis argued in the Trial Court, the Defendants fail to recognize that there are now so numerous and varied exceptions to the employee at-will "rule" that this rule now constitutes the exception. The Supreme Judicial Court provided express guidance by noting that it abandoned this archaic rule in

Donna Saxonis has also adequately demonstrated that the City of Lynn knew of this reliance. A. 65-66.

The Supreme Judicial Court specifically addressed this issue relative to Summary Judgment. An at will employee may defeat Summary Judgment by arguing that the Defendant is estopped from discharging her where the Defendant made representations or promises regarding the expected term. Upton v. JWP Businessland, 425 Mass. 756, 757-759 (1997). A promise enforceable in whole or in part by virtue of reliance is a "contract" pursuant to a "traditional contract theory" antedating the modern doctrine of consideration. See Sullivan v. O'Connor, 363 Mass. 579, 588 n.6, (1973); Restatement (Second) of Contracts § 90, Comment a (Tent. Drafts Nos. 1-7, 1973).

As to the Defendants contentions regarding G.L.c. 71, §§ 41 and 42, Plaintiffs claim that the Defendants acted to impair Mrs. Saxonis' seniority in bad faith. See e.g., Brophy v. School

Committee of Worcester, 6 Mass.App.Ct. 731 (1978). In addition to the 90 day rule, due process is required where the teacher has a right to expect continued employment. See Martin v. School Committee of Natick, 395 Mass. 461 (1983). In addition, the Plaintiff is entitled to a due process claim where the dismissal is a fabrication, arbitrary

PAGE 23 OF BRIEF

claim that Plaintiff must be retained until there was just cause for termination and that the employer was obliged to give adequate assistance, counseling and warning prior to termination. Id.

Interestingly, the Trial Court adopts a number of artful devices to accomplish its ruling. First, the Court intones that there are public policy exceptions to the rule, but finding, without comment, that none apply. A. 42. The Court's decision completely ignores, without comment, Donna Saxonis' extensive briefing on the issue of bad faith. A. 145-147.[16]

The Court's Memorandum raises and then dismisses an issue not directly addressed by Donna Saxonis. The Superior Court expresses its concern that Mrs. Saxonis may not have been afforded due process by the failure of notice and hearing as mandated by G.L. c.71, § 42. The Court resolves this problem by noting that Mrs. Saxonis' failure to work for ninety calendar days during the 1996 – 1997 school year. A. 42. Further, the Superior Court completely ignores the collective bargaining provision requiring thirty (30) days written notice of termination. E.V. 31.

No notice was ever given. Had it been given, Mrs. Saxonis would have qualified for both due process and

PAGE 24 OF BRIEF

seniority rights as she had in excess of 60 days service at termination. See A. 1-3. The Court's position then, appears, that the City of Lynn may ignore both express contractual provisions and the good faith and fair dealing requirement in order to bar a substitute from gaining statutory due process protection as well as basic Contract rights.

---

[16] For this reason that the Plaintiffs must submit memorandum to establish their arguments in the trial court.

That the Superior Court, without comment, ignored this notice requirement does not end of the inquiry. The Superior Court likewise ignored every express contractual protection contained within the Collective Bargaining Agreement despite extensive discussion of that agreement. See *supra* at 8.

The Contract and school policies firmly established that Mrs. Saxonis could not be replaced under these conditions. Id. The contract is very clear that long-term substitutes remain in place as long as the initial vacancy continues and they are willing to work. Id. There is no doubt that members of the bargaining unit are entitled to priority over non-members. Id. There is no doubt that the school administration must hire certified teachers before offering the position to non-certified individuals. Id.

Under no circumstances may a non-certified teacher replace a certified instructor on a long-term assignment. Id. However, this is what occurred. Donna

PAGE 34 OF BRIEF

representation. Id. Succinctly put, if the employee's loss results from the deliberately misleading conduct of the union, the union is then held accountable. Further, if a conspiracy is alleged and established at trial, both the union and the employer may be liable for the breach of the duty of fair representation in addition to the contract claims. Id. at 561, 563.

Further, because of the importance of rights given up by employees in the collective bargaining process, constitutional protections are implicated without the duty of fair representation. See Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 347-348 (1987). The Court's infer this duty as a constitutional requirement. Id.

In this light, the Union's failure to inform Donna Saxonis of the meeting involving impairment of seniority rights and the bald position that "substitute teachers" have no rights, argues for liability. E.V. 113-114.

In addition, the Court has clearly stated that liability exists where the union fails to assist an employee relative to a complaint. Graham at 608. It is simply not necessary that an employee request the union to process a grievance. Id. It is enough that the employee merely asks for help. Id. In addition, the

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

APPLICATION FOR FURTHER APPEALLATE REVIEW FROM THEAPEALS COURT, CASE NO: A.C.-2002-P-1350

SAXONIS, ET AL.,
V.
LYNN TEACHERS UNION LOCAL 1037, ET AL.,
APPELLANT DONNA SAXONIS' APPLICATION FOR

FURTHER

APPEALLATE REVIEW AND BRIEF IN SUPPORT THEREOF

DONNA SAXONIS AND

PAUL SAXONIS, APPELLANT
BY AND THROUGH HER
ATTORNEY
LESTER E. RIORDAN III
12 POND LAND, EB-1N
CONCORD, MASSACHSETTS
01742
(978) 341—0404 (978) 341—0405
FACSIMILE
B.B.O #663725

PAGE 14 OF APPEALLATE BRIEF

STATEMENT AND ARGUMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRAIE

Argument Relating to the City of Lynn

Donna Saxonis expressly alleged in her complaint wrongful termination and breach of contract by the City of Lynn. The wrongful termination claim relates to the termination of Mrs. Saxonis long-term substitute position, without notice, in both February and May of 1997. The contract action includes Mrs. Saxonis claim that, under the express language of the CBA, she was improperly denied an available full-time position in the summer of 1997. The contract claim relating to future employment asserts that a restoration of Mrs. Saxonis seniority rights relating to the wrongful discharge, as provided under the CBA, mandated her hiring for the position at issue.

The Trial Court disposed of Donna Saxonis claim on Summary Judgment by holding that, as a matter of law, G.L. c. 71, ' 42, rendered Donna Saxonis an employee at will. The Appeals Court, in relation to Donna Saxonis breach of contract claim, vacated the portion of the Trial Court judgment relating to detrimental reliance and amounts owed for work performed during the 1996-1997 school year. Rescript at 6 5. However, aside from detrimental reliance, the Appeals Court stated that [the

PAGE 23 OF APPELLATE BRIEF

Circuit. 1987), citing Vaca v. Sipes, 386 U.S. 171, 191 (1967) (indicating that a Union may not ignore a meritorious grievance). However, under Massachusetts law, a grievance need only be arguably meritorious to implicate the duty of fair representation. E.g. Graham, at 607 (1990). Thus, Mrs. Saxonis respectfully argues that the Appeals Court's vacating the judgment as to Count I relative to the City of Lynn establishes a basis for trial

relative to the Union where it is clear that the Union took no action on behalf of Mrs. Saxonis.

WHEREFORE, Appellant Donna Saxonis, by and through her counsel, requests this Honorable Court for leave to obtain further appellate review of this case, Saxonis et al. v. City of Lynn et al, APEALS COURT, CASE NO: A.C.-2002-P-1350 by the full Supreme Judicial Court pursuant to the Massachusetts Rules of Appellate Procedure, Rule 27.1.

Respectfully Submitted,
DONNA LINDA SAXONIS
By her attorney:

s/_____
Lester E. Riordan III
BBO No. 633725
12 Pond Lane, EB-1N
Concord, Mass.01742
978-341-0404
978-341-0405

AGREEMENT

between the

SCHOOL COMMITTEE
CITY OF LYNN

and the

LYNN TEACHERS UNION
LOCAL 1037, AFT. AFL-CIO

1995-1996
1996-1997

AP. 83

PREAMBLE

WHEREAS, the School Committee of the City of Lynn and the Lynn Teachers Union, Local 1037, American Federation of Teachers, AFL-CIO, acknowledge and reaffirm their realization that their common duty involves much more than their collective bargaining endeavors, and

WHEREAS, education of the highest quality is the goal of both the School Committee and the Lynn Teachers Union, and

WHEREAS, this goal will be approached constructively through periodic consultation, and

WHEREAS, in a secret ballot election, the Lynn Teachers Union was chosen by a majority of the teachers as the exclusive collective bargaining agent for all such teachers, and

WHEREAS, the School Committee and the designated representatives of the Lynn Teachers Union have fully considered and discussed changes in. salary schedules, improvement in professional working conditions, and a procedure for the solution of grievances

NOW THEREFORE, the following agreement is made and entered into on this 1st day of November, 1995, by and between the School Committee of the City of Lynn (hereinafter referred to as the "Committee") and the Lynn Teachers Union, Local 1037, American Federation of Teachers, AFL-CIO (hereinafter referred to as the "Union").

Article I
UNION RECOGNITION,
JURISDICTION AND DEFINITIONS

A. Union Recognition

The Lynn School Committee recognizes the Lynn Teachers Union, Local 1037, American Federation of Teachers, AFL-CIO as the exclusive bargaining representative for all classroom teachers including substitute teachers on a long term assignment, excluding all other employees of the School Department.

B. Jurisdiction

The jurisdiction of the Union shall include those persons now or hereafter who perform the duties or functions of the categories of employees in the bargaining unit, regardless of whether these duties or functions are performed by present, or modified by new processes or equipment.

C. Definitions

The term "school" as used in this Agreement means any work location or functional division maintained by the School Department.

The term "Principal" as used in this Agreement means the responsible administrative heads of their respective schools. The term "teacher" and the term "person" as used in this Agreement means a person employed by the Committee in the bargaining unit as described in Article I.

The term "Committee" as used in this Agreement shall be understood to mean the School Committee of the City of Lynn, a public body organized under the applicable provisions of the Constitution of the Commonwealth, the

General Laws of said Commonwealth as amended, and the City Charter of the City of Lynn, a political subdivision of said Commonwealth and functioning in accordance with the applicable laws, rules and regulations as have been adopted, promulgated or amended by said Commonwealth or City.

The term "Superintendent" as used in this Agreement shall be understood to mean the person holding the position of Superintendent of Schools of the Lynn School Department.

The term "Administration" or "The Administration" shall be understood to mean the same as "Superintendent", Associate Superintendent and Human Resource Manager.

The term "parties" as used in this Agreement refers to the Committee and the Union as participants in this Agreement. The term "union representative" as used in this Agreement means any qualified designee of the Union. The term "substitute teacher on a long term assignment" shall mean a substitute who has completed twenty (20) consecutive school days in one assignment.

Wherever the singular is used in this Agreement it is to include the plural.

Whenever in this Agreement a personal pronoun is used, such pronoun shall be understood to apply equally to both male and female members of the bargaining unit.

PAGE 12 OF AGREEMENT

G. Substitute Teachers Pay

Substitute teachers shall be paid $50.00 a day. Starting with the twenty-first (2 1st) day in one assignment, a substitute teacher will be paid in accordance with the regular schedule, determined by vote of the School Committee on the Superintendent's recommendation after consideration of the substitute's training and experience.

Long-term substitutes shall not receive a seniority date until he/she has been teaching ninety (90) days in succession and at that time his/her seniority date shall be deemed retroactive to the first day of said ninety (90) day period.

H. Teaching Before and/or After the Regular School Year

Any teacher required to work before and/or following the close of the school year shall be compensated at the same rate of salary which they receive during the school year, such payment to be based upon an hourly, daily or weekly rate, whichever is applicable.

I. Itemized Payroll Deductions

A statement of weekly payroll deductions shall be provided to each employee.

J. Mileage Allowance

Traveling teachers covered by this Agreement who are authorized to use private automobiles for school business shall be reimbursed at the rate of $200 per year.

K. Lynn Vocational Technical Institute

It is agreed and understood that those teachers at the Lynn Vocational Technical Institute teaching regular courses beyond the established school day shall be compensated on a prorated basis of their annual salary.

PAGE 14 OF AGREEMENT

pay for teachers of Summer school and Evening school. Other assignments shall be paid at the hourly rate of twenty-five dollars ($25.00).

O. Placement on the Salary Schedule

Members of the bargaining unit shall be placed on the salary schedule at the step appropriate for training and creditable years of experience.

P. Professional Travel

Teachers required by the Superintendent to travel out of town shall be reimbursed by the School Department for all expenses

incurred on visiting days or while attending educational conferences and conventions with approval of the Superintendent or his designee.

Q. Job Preference

Members of the bargaining unit shall have a job preference on all teaching positions beyond the regular school day or school year. On site teachers shall have first preference for teaching positions designated for that specific school population. Seniority based on consecutive years of experience in the Lynn School Department, certification, and ability to perform shall govern all assignments.

Article IV
FRINGE BENEFITS

A. Blue Cross - Blue Shield
The City of Lynn shall provide seventy-five percent (75%) of the cost of the Blue Cross - Blue Shield plan or HMO adopted. by the City under Chapter 32B of the

PAGE 22 OF AGREEMENT

mum teaching-learning conditions.

2. Transfer of pupils from one teacher to another is to be minimized.

J. Marks

1. Final marks should not be required of any teacher before May 15 for Grade 12, and fifteen (15) days before the close of school for Grades 7, 8, 9, 10 and 11.

2. A teacher's marks shall not be changed without valid reason. No marks shall be changed unless the teacher is consulted first. Grade changes will include the name/initial of the person making the change.

Grades received from summer school, home class, etc. shall include a code designation.

K. Training Teachers

1. Advance notice and. consultation with the teacher are prerequisites to the assignment of student teachers.

2. Vouchers for supervising teachers should be distributed on an equitable basis.

L Hiring of Substitutes

1. Employment of substitutes should be the responsibility of the administration, but may be delegated to department heads.

2. Substitutes shall be hired to cover classes of regularly assigned teachers when they are absent.

3. In emergency situations when substitutes are not available:

a. First, teachers with preparation periods shall be requested to substitute at $25.00 per hour.

b. If no one volunteers, an administrative period will be assigned at no cost.

PAGE 25 OF AGREEMENT

(1) school day each week for a length of time sufficient to meet the needs of the students.

6. All meetings shall not exceed one (1) hour beyond the close of school.

O. Safety and Health Standards

1. The School Department shall conform with all Massachusetts safety laws.

2. Primary grades (K-3) should be located in the classrooms on the first floor of school buildings wherever possible.

P. Assistance in Assault Cases

1. Principals shall report all cases of assault suffered by teachers, in connection with their employment, to the Superintendent of Schools.

2. Whenever it is alleged that a teacher has assaulted a person or that a person has assaulted a teacher, the Principal and Superintendent shall conduct an investigation of the incident. The Superintendent shall comply with any reasonable request from the teacher for relevant information in the Committee's possession not privileged under law concerning the person or persons involved.

Q. Termination of Employment

The required notice of termination of employment is thirty (30) days.

Teachers shall be given written notification of termination, at their last listed address provided to the School Department, following the vote of the School Committee.

R. Transporting Children

Teachers shall not transport children in the teacher's automobiles.

PAGE 26 OF AGREEMENT

S. Seniority

1. The School Department shall prepare a seniority list which indicates the date on which all members of the bargaining unit were hired.

2. Teacher seniority is based upon length of professional service in the Lynn School Department. Periods of service

divided by a break due to resignation or termination shall not be added together to determine seniority.

3. For leave purposes, only those leaves of absence covered by the contract shall accrue seniority.

T. Data Processing

1. The implementation of automated data processing will be employed as soon as practicable in all schools for:

a. attendance records
b. scoring standardized tests
c. census reports
d. schedules

2. Machine scoring of standardized tests shall be implemented in all schools.

U. Corridor Duty

The purpose of corridor duty assignment is to; (1) maintain the safe conduct of the school, an atmosphere where learning can take place without interruption; (2) act as a deterrent to vandalism; and (3) insure the safety and well- I being of the students at all times.

As a corridor monitor, teacher responsibility is simply to 1 question anybody who is in the corridor. If they are students attending the school. the' should have a corridor pass. If they are "outsiders," refer them to the office. At no time are you. as a corridor monitor, expected to get into a

PAGE 27 OF AGREEMENT

dispute with anybody in the corridor. Simply request identification (corridor pass) from a student or refer anyone other than a student to the office.

If anyone ignores your request to report to the office, merely let him go on his way and call the office from the nearest intercom phone.

Nothing in the above should be construed as to limit administrative periods to corridor duty only. It is understood that the corridor monitor shall be mobile.

V. Termination of Employees

1. An employee may be dismissed or his/her assignment to a building terminated if there is a substantial decrease in pupil enrollment, funding and/or cutbacks in programs, provided such dismissal or termination is done on a seniority basis.

2. Seniority basis shall mean:

a. Insofar as state certification laws permit, all teachers without professional status shall be terminated before a teacher with professional status.

b. All employees shall be terminated according to seniority within certification; in order of years of service within the School System, the employee with the least number of years service being the first to be terminated.

3. If layoffs are to be carried out or assignment to a building is to be terminated under sections 1 and 2 above, an affected teacher shall be offered the opportunity to transfer to any position within the bargaining unit for which he/she is certified and has seniority over other personnel in accordance with Article VII, Section B.

PAGE 28 OF AGREEMENT

Teachers affected by the aforementioned transfer policy shall also be given the same opportunity to transfer.

4. The transfer policy outlined in Section 3 shall begin after the June I posting and shall continue until all affected teachers have been

given the opportunity to transfer. Teachers shall be locked into their position for one school year following a transfer.

5. Any available positions, after the completion of transfers, shall be filled with any remaining unassigned teachers in order of seniority until the next posting of available positions at which time they may bid or be given the opportunity to transfer to any position within the bargaining unit for which they are certified and have seniority over other personnel.

6. Rehiring shall also be based on seniority, i.e., the person whose service was terminated last shall be the first reemployed:

a. Any member of the bargaining unit laid off because of the elimination of a position or a reduction in professional staff shall be placed on a recall list.

b. A copy of the recall list shall be made available to the Union.

c. A member shall possess recall rights for a period of five (5) years following the end of the school year in which the layoff occurs.

d. A member on layoff shall be recalled in order of seniority to a position within the bargaining unit for which he/she is certified before any new employee is hired.

e. A member on layoff shall have preference in the employment of day to day substitutes and substitutes on a long term assignment. If on a long term assignment, members of the bargaining unit shall be compensated at the rate

appropriate to the next step of service following the layoff. Failure to respond shall not constitute a forfeit of rights.

f. Notification of recall shall be thirty (30) days prior to the opening of school or as soon as possible when recall is to occur.

Notice shall be by telephone first and if no answer, by certified or registered mail. The position will be held for a response for ten (10) calendar days from date of mailing of letter. If the ten (10) days expire, the next senior staff member with the proper certification for said position shall be notified.

Failure to respond to the written notice of recall within the ten (10) day period will result in the member being frozen. on the recall list until the next opening for which he/she is certified.

g. A recalled member shall have the same benefits and seniority as of the last day of employment prior to layoff. For salary purposes, a member recalled to an open position, and not as a substitute, shall receive the appropriate amount as per the salary schedule from the first day of recall. A member recalled to a position as a long term substitute shall receive the appropriate amount, as per the salary schedule, from the first day of recall. An inactive member on the recall list shall not advance on the salary schedule until recalled.

h. The provisions of this Article shall not be construed to permit transfers or layoffs which would

(1) deprive any bargaining unit member of professional status or other rights to continued employment

(2) result in the assignment of a teacher to a position which requires special qualifications which the teacher does not possess.

PAGE 30 OF AGREEMENT

i. The Union shall be notified of impending recalls and succeeding action as soon as such information is known to the Department.

j. Employees on layoff shall receive prior notice of the time and place of postings. A member on layoff must fully exercise their

seniority rights at the time of posting of available positions. Failure to do so shall be a termination of seniority rights.

7. Teachers on layoff shall be allowed to retain their Blue Cross-Blue Shield or HMO coverage at group rates provided that the teacher will assume one hundred percent. (100%) of the cost as adopted by the City.

Article VI
Teacher Files -
Teacher Evaluations

A. Teacher Files

1. A teacher's personnel file shall be made up of all the documents and other materials which are accumulated from the beginning of a teacher's service in the Lynn Public Schools.

2. Teacher files shall be maintained under the following circumstances:

a. No material derogatory to a teacher's conduct, service, character or personality shall be placed in the files by an administrator unless the teacher is sent a dated copy at the same lime.

b. The teacher shall have the right to submit a response to the statement. The teacher's answer shall also be included in the file.

PAGE 31 OF AGREEMENT

home class and a full teaching program shall be given preference in the assignment of the number of preparations. First year and substitute teachers shall have no more than two (2) preparations daily.

e. Equitable standards shall be applied within each school for exemption from home rooms and administrative assignments.

f. In rooms with specific stations (shops, typing rooms, laboratories), the number of pupils assigned to such rooms shall not exceed the number of stations available.

3. Rotation

a. In the assignment of home room classes the policy of annual rotation shall be followed insofar as possible.

b. In the matters of non-teaching assignments, the policy of annual rotation should be followed except for unusual circumstances. It is understood, however, that, upon his request a

PAGE 47 OF AGREEMENT

teacher may retain a particular non-teaching assignment if the needs of the school will be served thereby.

Article XI
Grievance Procedure

A. Definition

1. A grievance" shall mean a complaint by an employee or the Union that there has been a violation, misinterpretation, or inequitable application of any of the provisions of this Agreement.

PAGE 48 OF AGREEMENT

2. As used in this Article the term "employee" shall mean either an individual employee or a group of employees having the same grievance.

3. The Union may initiate and process grievances under the following procedure, acting in place of the employee.

B. Adjustment of Grievance

1. Level 1 - Principal

a. An employee may present a grievance to the Principal of the school within fifteen (15) school days following knowledge by the grievant of the act or condition which is the basis of his complaint, unless the grievant has a valid, excuse for later filing.

b. The employee and the Principal shall first confer on the grievance with a view to arriving at a mutually satisfactory resolution of the complaint. At the conference, the employee may be represented by the appropriate Union representative; but where the employee is represented he must be present. Whenever a grievance is presented to the Principal by the teacher personally, the Principal shall give the Union representative the opportunity to be present and state the views of the Union.

c. The Principal of the school shall communicate his decision in writing to the aggrieved employee and to the Union representative who participated within five (5) school days after receiving the complaint.

d. The Principal shall send a copy of his decision to the Associate Superintendent.

2. Level 2 - Associate Superintendent of Schools

a. If the grievance is not satisfactorily adjusted, the

aggrieved employee may appeal it within five (5) school (lays to the appropriate superior for a satisfactory adjustment. The appeal shall be in writing and shall set forth specifically the act or condition and the grounds on which the grievance is based.

b. The Associate Superintendent shall meet and confer with the aggrieved employee. The aggrieved employee and his representatives, if any, shall be given at least two (2) school days notice of the conference and an opportunity to participate.

c. The employee shall be present at the conference, except that he need not attend where it is mutually agreed that no facts are in dispute and that sole question is one of interpretation of a provision of this Agreement, or of what is established policy or practice.

d. Notice of the conference shall also be given to the Principal of the school who rendered the decision at Level 1. The Principal of the school may be present at the conference to state his or her views.

e. Where the employee is not represented by the Union at this level, the appropriate superior shall furnish the Union with a copy of the appeal from Level I, together with notice of the date of the Conference. in such cases, the Union may be present and state its views.

f. The appropriate superior shall communicate his decision in writing, together with the supporting reasons, to the aggrieved employee, to the Union representatives who participate at this level, and to the Principal of the school who rendered the decision

PAGE 50 OF AGREEMENT

at Level I within ten (10) school days after receiving the appeal.

3. Level 3 - Superintendent of Schools

a. If the grievance is not resolved at Level 2, the aggrieved employee may appeal from the decisions at Levels I and 11 to the Superintendent of Schools within ten (10) school days after the decision of the appropriate superior has been delivered. The appeal shall be in writing, shall set forth specifically the reasons for the appeal, and shall be accompanied by a copy of the appeal and the decision at Level 2.

b. The Superintendent of Schools, or his designated representative, shall meet and confer with the aggrieved employee with a view to arriving at a mutually satisfactory resolution of the complaint. The aggrieved employee and the appropriate Union 1

representative shall be given at least two (2) school days notice of the conference and an opportunity to be heard.

c. Notice of the conference shall also be given to the Principal of the school and to the Associate I Superintendent. The Principal of the school and the appropriate superior may be present at the conference and state their views.

d. When the employee is not represented by the Union at this level, the Superintendent of Schools shall furnish the Union with a copy of the appeal from Level 2 together with notice of the date of the conference. In such cases, the Union may be present and state its views.

e. The Superintendent shall communicate his decision

PAGE 51 OF AGREEMENT

in writing, together with the supporting reasons, to the aggrieved employee and to any Union representatives who participated at this level within ten (10) school days after receiving the appeal.

f. The Principal of the school and the appropriate superior shall also receive a copy of any decision at this level.

4. Special Procedures for Grievances Relating to Salary and Leave Matters:

a. Any grievance based on a complaint that the employee has been placed on the wrong salary schedule, or step, or that he has been improperly denied an increment, or that his salary has been miscalculated or that the person's absence deduction was improperly calculated, shall be filed directly with the Human Resource Manager and shall, next be appealed to the Superintendent of Schools. In such cases, the provisions of the general procedures relating to step 2 shall apply to the presentation and adjustment of the grievance at the level of the Human Resource Manager except that:

(1) The grievance shall be filed within fifteen (15) school days following knowledge by the grievant of the act or condition

which is the basis of the complaint, unless the grievant has a valid excuse for later filing.

(2) The employee need not be present at the conference. The provisions of the general procedures relating to Level 3 shall apply to any appeal to the Superintendent of Schools from the decision of the 1-luman Resource Manager.

PAGE 52 OF AGREEMENT

5. Time Limits

a. The time limits in this Article may be extended by mutual agreement.

b. Failure at any level of the Grievance Procedure to appeal within the specified time limits shall be considered acceptance by the employee of the decision rendered.

c. Failure at any level of the Grievance Procedure to communicate a decision within the specified time limits shall permit the employee to proceed to the next level.

Article XII
Arbitration

A grievance dispute which was not resolved at the level of the Superintendent under the grievance procedure may be submitted by the Union to arbitration. The proceeding may be initiated by filing with the School Committee and the American Arbitration Association a request for arbitration. The notice shall be filed within ten (10) school days after receipt of the decision of the Superintendent, under the Grievance Procedure. The voluntary labor arbitration rules of the American Arbitration Association shall apply to the proceeding.

The parties shall determine by lot which of them shall strike first from the list of arbitrators submitted. The arbitrator shall issue

his decision not later than thirty (30) days from the date of the close of the hearings or, if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the arbitrator. The decision shall be in writing and shall set forth the arbitrators opinion

THE COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

ESSEX, SS CIVIL ACTION NO: 00-1367C

DONNA SAXONIS,
PAUL SAXONIS,

Plaintiffs

v.

THE CITY OF LYNN, PATRICK J. MCMANUS, MAYOR LYNN PUBLIC SCHOOLS, DR. JAMES MAZAREAS, SUPERINTENDENT, LYNN SCHOOL COMMITTEE MEMBERS 1996-2001, JUDITH A. FLANAGAN KENNEDY FRANK M. CARRABBA, STEPHEN J. DUFFY, WILLIAM F. MCGUINNESS, GEORGE K. MAZARESA, WILLIAM M. MCDONALD, TIMOTHY MCMANUS, MADELYN DAY BARRY, LORETTA CUFFE-O'DONNELL, CAROLYN, A. MURRAY, DR. JAMES T. LEONARD,

RETIRED SUPERINTENDENT, EDWARD B. JOHNS, DEPUTY SUPERINTENDENT, PATRICIA M. LIBBY, DIRECTOR OF HUMAN RESOURCES, BARTLEY J. CONLON, PRINCIPAL LTVI, ALBERT G. MALIGRIFA, RETIRED PRINCIPAL, LTVI, EVELYN G. LAZARIS, RETIRED TEACHER LVTI, LORRAINE A. LEBRUN, TEACHER LTVI, JOSEPH O'HAGAN, VICE-PRINCIPAL LTVI, JOSEPH G. GAUVAIN, PRESIDENT, AND THE LYNN TEACHERS UNION LOCAL 1037, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ET AL,

Defendants

AFFIDAVIT OF JACQUELINE WHYTE

The Affiant, Jacqueline Whyte, states that she is of legal age and sound mind and testifies as follows:

1. I served as Department Head for Cosmetology at Lynn Vocation Technical Institute (LVTI).

2. I served as Donna Saxonis' supervisor while she worked at LVTI.

3. I hired Donna Saxonis to substitute for Evelyn Lazaris, based on Defendant Malagrifa's direction and approval, until the end of the 1996-1997 school year.

4. Affiant has reviewed the Affidavit of Donna Saxonis filed in the above captioned case and attached to this Affidavit and states, to the best of Affiant's knowledge and recollection, said Affidavit is true and correct.

5. Further, relative to the facts set forth in said Affidavit involving Affiant, each and every fact, as discussed below is, to the best of Affiant's knowledge and recollection, said Affidavit is true and correct.

6. Further, relative to the facts set forth in said Affidavit involving Affiant, each and every fact, as discussed below is, to the best of Affiant's knowledge and recollection, is true and correct.

7. Further, relative to the facts set forth in said Affidavit involving Affiant, each and every fact, as discussed below, to the best of Affiant's knowledge and recollection, was known to Defendant Malagrifia.

8. Regarding Paragraph 6 and of this Affidavit, each and every action I took relative to the hiring, dismissal and rehiring of Donna Saxonis, as set forth below, was approved by or ordered by Defendant Malagrifia.

9. Regarding Paragraph 4 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and

recollection, is true and correct.[17] Said paragraph reads as follows:

> On my first day as a substitute teacher, Ms. Whyte explained to me that Defendant Lazaris would not be coming back. She asked if I was available to take a position as a long-term substitute. Ms. Whyte indicated that I would be hired until the end of the school year.

10. Regarding Paragraph 5 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I asked Ms. Whyte if I should close my business. Her reply was something to the effect that all she knew is that she was told that Defendant Lazaris was not coming back to LVTI. It was clear from our conversation that I could not maintain my business and still work as a long-term substitute. Because of this I made a decision, after discussing it with Ms. Whyte, to tell my customers and close my shop Monday through Friday. I called several customers to inform them that I was closing my shop. I also told some of my customers in person that I was closing and could not take any more business. I believe Ms. Whyte, Ms. Ryan and some other individuals at LVTI were aware of this. In my mind, this decision was necessary in order for me to take the position. No one ever advised me to not close my business. Defendant Malagrifa, I recall was aware that I had a full-time shop.

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[17] To the extent a paragraph indicates that I have personal knowledge of the facts stated, I assert that such paragraph is true and correct. To the extent that I do not have personal knowledge, see Paragraphs 4 and 5. If a paragraph refers to material in which I have both personal knowledge and clearly do not have personal knowledge, my attestation is applicable to that in which I have knowledge unless Paragraphs 4 and 5 apply. In most cases, Paragraphs 4 and 5 will apply. When this is not the case, lack of knowledge is self-evident.

11. Further, regarding the above Paragraph, Defendant Malagrifia was aware that Donna was closing her business and that it would be impossible for her to accept this position and still maintain the business.

12. Regarding Paragraph 6 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I did not ask Ms. Whyte about her authority to hire me for a long-term assignment. At that time, I did not really understand that there were differences between long-term assignments and other substitutes. It was my understanding that she was the department head and I assumed that she was authorized to hire me or that she received instructions from the principal. I always took my instructions from the department head whenever I worked at LVTI. During this conversation, Ms. Whyte explained the procedure related to working twenty days for fifty dollars a day, and then receiving the regular teacher's salary on the twenty-first day. It was not until in late 1997 or 1998 that I learned that the regular teacher's salary was supposed to be paid retroactively. I never received retroactive pay for my work December, 1997. In fact, I did not discover that the Defendants had engaged in the wrongful acts and had covered up these acts relative to the issues discussed here until after August 27, 1997. In many cases I did not realize what had actually occurred, until almost the time that the lawsuit was filed.

13. Further, regarding the above Paragraph, under Defendant Malagrifia's direction, I issued to Donna Saxonis and teachers day planner and attendance book. The planner is only issued to long-term employees; there is no need to issue such a book to day-to-day substitutes. I am unaware of any situation where a day-to-day substitute was issued a planner.

14. Further, regarding the above Paragraph, to my recollection, Donna Saxonis never missed a scheduled school day during the time that she worked at LVTI. Further, she worked three additional days because Ann Fountain could not report to work as originally anticipated.

15. Regarding Paragraph 7 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I later had a second discussion with Ms. Whyte regarding this position. She took me aside, and told me that Defendant Malagrifa and Defendant Lazaris thought it would be a good idea if they rotated substitutes on a 30-day basis. She did not indicate whether this would actually happen. She told me that we would discuss it after school vacation. Based on my recollection, this conversation took place a few days before school vacation. I believe I discussed this issue with Ms. Ryan.

16. Further, regarding the above Paragraph, a thirty-day rotation system was never used previously and I was unaware as to any other individuals, other than Donna Saxonis and Ann Fountain, where were considered for such a rotation. After Ann Fountain left the position. Donna Saxonis was rehired.

17. Further, regarding the above Paragraph, I was completely unaware of any allegation that Ann Fountain left the position regarding any alleged harassment on the part of Donna Saxonis. I never witnessed Donna Saxonis act in any improper or unprofessional manner towards anyone, including Ann Fountain. Further, I was not aware of any complaint pertaining to Donna Saxonis in this regard.

18. Further, regarding the above Paragraph, Defendant Malagrifa, based on my knowledge of said Defendant, would

not have re-hired Donna Saxonis had Donna Saxonis engaged in such conduct.

19. Further, regarding the above Paragraph, Ann Fountain, while a nice person, was not qualified to teach at LVTI as a long-term substitute in that, to my knowledge, she had no prior work experience or certificate. Defendant Malagrifia was aware of this at the time Ann Fountain took the position. I was not consulted regarding Ann Fountain's departure and therefore, I do not know if this factor was considered in her termination or resignation, whichever occurred.

20. Regarding Paragraph 8 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> During the vacation I learned from an acquaintance that Ann Fountain was going to teach cosmetology at LVTI. Several days after my return, I spoke with Ms. Whyte regarding the teaching position. She indicated that I was to be replaced by another substitute. She stated that this substitute was coming in for a thirty-day period. She initially told me my last day would be in early February (I do not recall the exact date), but she later asked me to stay until February 14, 1997. I believe I began to receive regular teacher's salary on or about January 21, 1997. I was not paid retroactively to the beginning of December.

21. Regarding Paragraph 11 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I was subsequently asked to return to LVTI by Ms. Whyte. I asked Ms. Whyte how long the assignment would last. She said, "the remainder of the school year". This conversation was over the phone and we discussed the fact that the last assignment was

supposed to be for the remainder of the year as well. My recollection is that Ms. Whyte noted that I would receive regular teacher's pay at the beginning of this assignment.

22. Regarding Paragraph 14 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I was asked in depositions on several occasions if I had any evidence that indicates that Ms. Whyte had the authority to hire me as a long-term substitute and for the 1997/1998. I took my instructions from Ms. Whyte. I viewed her as my boss. I believed that she was acting on instructions from her supervisors and our conversations naturally suggested that this was true. I would not have questioned her direction or expected that I would have had personal contact with the principal on this issue. I also had reason to believe that she had the authority from Mr. Malagrifa because I was hired, as she indicated, as a long-term substitute. In addition, Mr. Malagrifa knew I was working at the school. Ms. Whyte had papers that appeared related to both my employment and discharge. I should also add that the physical confirmed my beliefs in this regard. Some of the paperwork in the employment packet indicated that the application process related to a permanent position. For instance, I was given a union card. As I understood it, the physical was for a retirement-based position. As I stated, Ms. Whyte indicated that I was processing the paperwork for next year. In addition, although I had now served as a substitute and a long-term substitute on two occasions, I had never been asked to take a physical or fill out employment related papers of this nature.

23. Regarding Paragraph 15 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and

recollection, is true and correct. Said paragraph reads as follows:

> Regarding the return or potential return of Defendant Lazaris, I was concerned regarding this and asked if this impacted my physical. I was under the impression that Defendant Lazaris was going to retire. I felt better about it, after my discussion with Ms. Whyte. I completed my employment packet and physical subsequent to learning that Defendant Lazaris might return.

24. Regarding Paragraph 16 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I was disappointed with the fact that my position was discontinued with Defendant Lazaris' return. I viewed this as if I had been laid off rather then terminated and the assurances of both Ms. Whyte and Defendant Malagrifa underscored this. For instance, I met with Defendant Malagrifa, I believe on May 9, 1997. I thanked him for the opportunity of being able to work with the children. We discussed that when Mrs. Lazaris retires, I would enjoy being employed at LVTI. During that meeting he indicated that Defendant LeBrun expressed interest in the teaching position. As I recall, during the conversation he looked up Defendant LeBrun in his phone rolodex.

25. Regarding Paragraph 17 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> I also spoke with Ms. Ryan regarding these issues. Ms. Ryan said that if they sent you for a physical and they fill everything out, you're going to be permanently hired and that I would be here next year.

Ms. Libby said the same thing. I know the attorneys have suggested that I did not have any basis to rely on these statements. In terms of Ms. Whyte, I placed some reliance on what she told me because she was my boss. In terms of Ms. Ryan, I just believe or assumed – and I thought this was reasonable – that she understood the process. She was a teacher. She went though the process. So, I did not think Ms. Ryan had authority or even was carrying out instructions like Ms. Whyte, but I did think she understood the procedures which were in place. Ms. Libby, I believed was responsible for these procedures.

26. Regarding Paragraph 20 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> As I testified in my deposition, I took the representations of Defendant Malagrifa, together with the instructions and information passed on from Ms. Whyte and others, as a sincere assurance that I would be teaching next year.

27. Regarding Paragraph 24 of the Affidavit of Donna Saxonis, said Paragraph, to the best of Affiant's knowledge and recollection, is true and correct. Said paragraph reads as follows:

> Well, I arrived for this meeting, Defendant Malagrifa's secretary was sitting in the office and Mr. Conlon was sitting in a desk in back of her. Mr. Conlon did not attend the meeting. As I recall, Defendant Malagrifa came out of his office area. He was wearing chinos, sneakers and a T-shirt. A little past 8:30 in the morning, Mrs. Lazaris arrived. Mrs. Lazaris in a conversation with Defendant Malagrifa's secretary indicated that Malagrifa called her the last night and told her that he needed her to help him with the cosmetology interviews. Mrs. Lazaris stated to

me that what is really going to hurt me is LVTI wants someone younger. When Defendant Malagrifa came in and he closed the door. He state that he knew I was paid on a level 6, but that he was going to pay me on a level 9, He said he fights for his teachers. He said, that both the Mayor and Dr. Leonard were mad at him and added something to the effect that nobody would tell him what to do. He also said that he called Ms. Whyte to come down for this interview, and she couldn't make it. Ms. Whyte, based on my conversation with her denies this. He may have indicated that he invited another person as well. Up until I heard Ms. Lazaris mention it, I had no idea this was an interview. However, I really didn't fully understand that this was an interview until Defendant Malagrifa made the statement to that effect. When Defendant Malagrifa's secretary called me, I thought I was going to school to discuss school policy, how the school is run, parking permits.

28. Further, regarding the above Paragraph, I was never asked to attend any interview or meeting regarding Donna Saxonis or Defendant LeBrun. Defendant Malagrifia already knew that I considered Donna Saxonis the best candidate for the position. In addition, Defendant Malagrifia and I discussed my concern that Defendant LeBrun was not qualified given her past work experience.

29. Regarding those Paragraphs in the Affidavit of Donna Saxonis that I have not specifically addressed in this Affidavit, based on my knowledge of operation of LVTI, my presence at LVTI, my responsibilities at LVTI and my knowledge of the various parties, to the best of Affiant's knowledge and recollection, those paragraphs are true and correct.

30. Further, based on my personal knowledge and observation of Donna Saxonis, Donna Saxonis has an excellent reputation and is forthright and truthful.

31. Further, based on my personal knowledge and observation of Donna Saxonis, Donna Saxonis was an excellent teacher during her work at LVTI.

The statements in this Affidavit are true to the best of my knowledge and recollection and I signed this Affidavit under the penalties of perjury this day, May 6, 2002,

s/_____
Jacqueline Whyte

STATE OF NEW HAMPSHIRE)
) ss.
COUNTY OF CARROLL)

Personally appeared Jacqueline Whyte on 05/06/02, and acknowledged the foregoing instrument to be her free act and deed, before me,

/s/ Starr L. Hill

Notary Public

My Commission
expires: 03/22/05

LYNN TEACHERS UNION LOCAL 1037
AMERICAN FEDERATION OF TEACHERS
AFFILIATED WITH THE AFL CIO

679 WESTERN AVE, LYNN, MA

617-599-5591

May 1, 1997

Mr. Albert G. Malagrifa
Director
LVTI
80 Neptune Blvd.
Lynn, MA 01905

Dear Mr. Malagrifa:

The purpose of this correspondence is to summarize our meeting of April 3O, l997. In attendance at this meeting were Mr. St. Pierre, Mr. Conlon, yourself and myself. Two items were on our agenda for discussion. First, the use of day-to-day substitutes and teacher compensation. Secondly, the removal of long-term substitutes from assignments at LVTI. Our understanding of the agreement is as follows:

1. Day-to-day substitutes will not receive a daily schedule in excess of five(5) teaching assignments for academic and related teachers and will not exceed the normal daily assignment for shop teachers.

2. In emergency situations when substitutes are not available, teachers with preparation periods at that time will first be requested to serve in accordance with the Contract. If no one volunteers, a teacher on an administrative assignment may be selected at no cost to the administration.

3. Long-term substitutes will not be removed from their assignments in an effort to solely reduce the cost to the system. Nor will they be removed to prevent an employee from achieving seniority or other benefit status.

Whereas the purpose of the meeting was to discuss a grievance filed by the Union, Local 1037 requests a conformation or clarification in writing from your office.

s/_____
Joseph G. Gauvain

Kb

cc: Mr. St. Pierre
Mr. Cordon

THE COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
ESSEX, SS CIVIL ACTION NO: 00-1367C

DONNA SAXONIS,
PAUL SAXONIS,

Plaintiffs

v.

THE CITY OF LYNN, PATRICK J. MCMANUS, MAYOR LYNN PUBLIC SCHOOLS, DR. JAMES MAZAREAS, SUPERINTENDENT, LYNN SCHOOL COMMITTEE MEMBERS 1996-2001, JUDITH A. FLANAGAN KENNEDY FRANK M. CARRABBA, STEPHEN J. DUFFY, WILLIAM F. MCGUINNESS, GEORGE K. MAZARESA, WILLIAM M. MCDONALD, TIMOTHY MCMANUS, MADELYN DAY BARRY, LORETTA CUFFE-O'DONNELL, CAROLYN, A. MURRAY, DR. JAMES T. LEONARD, RETIRED SUPERINTENDENT, EDWARD B. JOHNS, DEPUTY SUPERINTENDENT, PATRICIA M. LIBBY, DIRECTOR OF HUMAN RESOURCES, BARTLEY J. CONLON, PRINCIPAL LTVI, ALBERT G. MALIGRIFA, RETIRED PRINCIPAL, LTVI, EVELYN G. LAZARIS, RETIRED TEACHER LVTI, LORRAINE A. LEBRUN, TEACHER LTVI, JOSEPH O'HAGAN, VICE-PRINCIPAL LTVI, JOSEPH G. GAUVAIN, PRESIDENT, AND THE LYNN TEACHERS UNION LOCAL 1037, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ET AL,

Defendants

AFFIDAVIT OF DONNA LINDA SAXONIS

The Affiant, Donna Linda Saxonis, states that she is of legal age and sound mind and testifies as follows:

1. I recently retained an Attorney to assist me with this matter and I understand that I am executing this Affidavit in conjunction with

a Motion filed by the Defendants. Given the time limits, my Attorney asked me to review my depositions and the complaint. To the extent that I have not addressed a factual matter in this Affidavit of which I have personal or first hand knowledge that is also set-forth in the complaint, I am adopting those representations for the purposes of this Affidavit as true. This is to my best knowledge and belief. Therefore, I incorporate by reference the complaint filed in this matter.

2. In December 1996, I closed down my full-time hairdressing business when I took up a teaching position at Lynn Vocational Technical Institute (hereinafter "LVTI"). During the time I operated my business full-time, I serviced approximately forty-five to fifty clients. Prior to or subsequent to accepting the position at LVTI, I continued to see customers only on Saturdays. I ceased my full time operation because I was first offered a long-term teaching position at LVTI and later offered a permanent position. I returned to my business on a more active basis, but less then full-time, in September, 1997.

3. Mr. Paul Buccheri contacted me on December 2 or 3, 1997, he asked me to substitute for Defendant Lazaris. Mr. Buccheri indicated that he was acting as department head. During my initial conversation with Mr. Buccheri, I indicated that I would be available for additional days. Mr. Buccheri expected that this would become a long-term position because Defendant Lazaris was not coming back to LVTI. Initially, however, my recollection is that Mr. Buccheri asked that I make myself available for one or two days.

4. On my first day as a substitute teacher, Ms. Whyte explained to me that Defendant Lazaris would not be coming back. She asked if I was available to take a position as a long-term substitute. Ms. Whyte indicated that I would be hired until the end of the school year.

5. I asked Ms. Whyte if I should close my business. Her reply was something to the effect that all she knew is that she was told that Defendant Lazaris was not coming back to LVTI. It was clear from our conversation that I could not maintain my business and

still work as a long-term substitute. Because of this I made a decision, after discussing it with Ms. Whyte, to tell my customers and close my shop Monday through Friday. I called several customers to inform them that I was closing my shop. I also told some of my customers in person that I was closing and could not take any more business. I believe Ms. Whyte, Ms. Ryan and some other individuals at LVTI were aware of this. In my mind, this decision was necessary in order for me to take the position. No one ever advised me to not close my business. Defendant Malagrifa, I recall was aware that I had a full-time shop.

6. I did not ask Ms. Whyte about her authority to hire me for a long-term assignment. At that time, I did not really understand that there were differences between long-term assignments and other substitutes. It was my understanding that she was the department head and I assumed that she was authorized to hire me or that she received instructions from the principal. I always took my instructions from the department head whenever I worked at LVTI. During this conversation, Ms. Whyte explained the procedure related to working twenty days for fifty dollars a day, and then receiving the regular teacher's salary on the twenty-first day. It was not until in late 1997 or 1998 that I learned that the regular teacher's salary was supposed to be paid retroactively. I never received retroactive pay for my work December, 1997. In fact, I did not discover that the Defendants had engaged in the wrongful acts and had covered up these acts relative to the issues discussed here until after August 27, 1997. In many cases I did not realize what had actually occurred, until almost the time that the lawsuit was filed.

7. I later had a second discussion with Ms. Whyte regarding this position. She took me aside, and told me that Defendant Malagrifa and Defendant Lazaris thought it would be a good idea if they rotated substitutes on a 30-day basis. She did not indicate whether this would actually happen. She told me that we would discuss it after school vacation. Based on my recollection, this conversation took place a few days before school vacation. I believe I discussed this issue with Ms. Ryan.

8. During the vacation I learned from an acquaintance that Ann Fountain was going to teach cosmetology at LVTI. Several days after my return, I spoke with Ms. Whyte regarding the teaching position. She indicated that I was to be replaced by another substitute. She stated that this substitute was coming in for a thirty-day period. She initially told me my last day would be in early February (I do not recall the exact date), but she later asked me to stay until February 14, 1997. I believe I began to receive regular teacher's salary on or about January 21, 1997. I was not paid retroactively to the beginning of December.

9. I subsequently had a conversation with Defendant Malagrifa. He indicated that after Ann Fountain, he planned on hiring a Mike Freeman as part of his rotation system. He also stated that I would be coming back. I was disappointed but, in light of Defendant Malagrifa's comment that I would be coming back, I did not want to jeopardize my job. I also thought the people at LVTI were just doing their job and I had no reason to distrust them.

10. At the time of the events described herein, I was a fully certified teacher. As I understand it, you have additional time to complete certain credits applicable to your certification. I completed my class work, I believe, in 1997.

11. I was subsequently asked to return to LVTI by Ms. Whyte. I asked Ms. Whyte how long the assignment would last. She said, "the remainder of the school year". This conversation was over the phone and we discussed the fact that the last assignment was supposed to be for the remainder of the year as well. My recollection is that Ms. Whyte noted that I would receive regular teacher's pay at the beginning of this assignment.

12. I did not file a grievance relating to the hiring of Ann Fountain. I did not have any conversations with any representative of the union regarding this issue. At that time, I did not know who the representative was at LVTI. I did not make any attempt to contact a union official at that time because I did not want to cause any waves. Defendant Malagrifa had indicated to me that I would return to teaching at the school and I did not want to put

my future at LVTI at risk. I was not aware, at that time, that Defendant Malagrifa never intended that I would be hired to fill Defendant Lazaris' position. I am aware, however, that a grievance was filed. The union never contacted me regarding this grievance.

13. Subsequent to my return, I was instructed that I go over to the administration building to fill out certain papers relating to continued employment for the next school year. As I understood my conversation, I was being offered a permanent position based on what Patricia Libby called a conditional offer. This occurred in early April 1997. I was not asked to complete this paperwork during my first assignment between December, 1996 and February 1997. I was not asked to complete this paperwork in relation to the current year, but rather in relation to "next year." This was the first time I was asked to take a physical.

14. I was asked in depositions on several occasions if I had any evidence that indicates that Ms. Whyte had the authority to hire me as a long-term substitute and for the 1997/1998. I took my instructions from Ms. Whyte. I viewed her as my boss. I believed that she was acting on instructions from her supervisors and our conversations naturally suggested that this was true. I would not have questioned her direction or expected that I would have had personal contact with the principal on this issue. I also had reason to believe that she had the authority from Mr. Malagrifa because I was hired, as she indicated, as a long-term substitute. In addition, Mr. Malagrifa knew I was working at the school. Ms. Whyte had papers that appeared related to both my employment and discharge. I should also add that the physical confirmed my beliefs in this regard. Some of the paperwork in the employment packet indicated that the application process related to a permanent position. For instance, I was given a union card. As I understood it, the physical was for a retirement-based position. As I stated, Ms. Whyte indicated that I was processing the paperwork for next year. In addition, although I had now served as a substitute and a long-term substitute on two occasions, I had never been asked to take a physical or fill out employment related papers of this nature.

15. Regarding the return or potential return of Defendant Lazaris, I was concerned regarding this and asked if this impacted my physical. I was under the impression that Defendant Lazaris was going to retire. I felt better about it, after my discussion with Ms. Whyte. I completed my employment packet and physical subsequent to learning that Defendant Lazaris might return.

16. I was disappointed with the fact that my position was discontinued with Defendant Lazaris' return. I viewed this as if I had been laid off rather then terminated and the assurances of both Ms. Whyte and Defendant Malagrifa underscored this. For instance, I met with Defendant Malagrifa, I believe on May 9, 1997. I thanked him for the opportunity of being able to work with the children. We discussed that when Mrs. Lazaris retires, I would enjoy being employed at LVTI. During that meeting he indicated that Defendant LeBrun expressed interest in the teaching position. As I recall, during the conversation he looked up Defendant LeBrun in his phone rolodex.

17. I also spoke with Ms. Ryan regarding these issues. Ms. Ryan said that if they sent you for a physical and they fill everything out, you're going to be permanently hired and that I would be here next year. Ms. Libby said the same thing. I know the attorneys have suggested that I did not have any basis to rely on these statements. In terms of Ms. Whyte, I placed some reliance on what she told me because she was my boss. In terms of Ms. Ryan, I just believe or assumed – and I thought this was reasonable – that she understood the process. She was a teacher. She went though the process. So, I did not think Ms. Ryan had authority or even was carrying out instructions like Ms. Whyte, but I did think she understood the procedures which were in place. Ms. Libby, I believed was responsible for these procedures.

18. On several occasions when I saw Mr. Malagrifa in the corridors, he would ask me if Defendant Lazaris' job had been posted yet. On more than one occasion he would tell me to go take a look and I would run down to the teacher's room and it would not be there. In retrospect, I think this was cruel. He did that on many occasions.

19. In one conversation with Defendant Malagrifa, he came in to school library with some boxes and he put two of them on the table. He called me over, and asked me if I could use these next year. The boxes contained shampoo, deodorant, conditioner, and similar products. He indicated that he would send some boxes up and put them in the back room for next year. My recollection is that Mr. Swirka, a teacher at LVTI, was in the library at the time.

20. As I testified in my deposition, I took the representations of Defendant Malagrifa, together with the instructions and information passed on from Ms. Whyte and others, as a sincere assurance that I would be teaching next year

21. In another conversation, Defendant Malagrifa indicated that Defendant Lazaris had made the decision to retire and that her job would be open. After this, he continued to ask me to check to see if the job had been posted. I did not take this to mean that I would then be able to apply for the position since I had already been told that I was coming back.

22. On the day I learned that Defendant Lazaris' job was posted in the teachers' room, I went over to the administration building, to ask what I had to do relating to my position. I spoke to Georgia Aucone. She told me not to worry and said that I was all set because I had given her my resume and the other papers in my administration packet.

23. In August of 1997 I was asked if I could come down to the school and have a meeting with Defendant Malagrifa. I was not told of the purpose of this meeting and I assumed it related to my duties for the following year. I had no idea that this meeting was an interview. It is my recollection that this meeting took place on August 6, 1997.

24. Well, I arrived for this meeting, Defendant Malagrifa's secretary was sitting in the office and Mr. Conlon was sitting in a desk in back of her. Mr. Conlon did not attend the meeting. As I recall, Defendant Malagrifa came out of his office area. He was wearing chinos, sneakers and a T-shirt. A little past 8:30 in the morning,

Mrs. Lazaris arrived. Mrs. Lazaris in a conversation with Defendant Malagrifa's secretary indicated that Malagrifa called her the last night and told her that he needed her to help him with the cosmetology interviews. Mrs. Lazaris stated to me that what is really going to hurt me is LVTI wants someone younger. When Defendant Malagrifa came in and he closed the door. He state that he knew I was paid on a level 6, but that he was going to pay me on a level 9, He said he fights for his teachers. He said, that both the Mayor and Dr. Leonard were mad at him and added something to the effect that nobody would tell him what to do. He also said that he called Ms. Whyte to come down for this interview, and she couldn't make it. Ms. Whyte, based on my conversation with her denies this. He may have indicated that he invited another person as well. Up until I heard Ms. Lazaris mention it, I had no idea this was an interview. However, I really didn't fully understand that this was an interview until Defendant Malagrifa made the statement to that effect. When Defendant Malagrifa's secretary called me, I thought I was going to school to discuss school policy, how the school is run, parking permits.

25. During this interview, Defendant Lazaris was in possession of my personal file. During the interview, Defendant Lazaris said that I was not certified. This was not true and I became very concerned because I knew that she was aware that I was certified. During one point she tossed my resume over to Defendant Malagrifa. I also saw her with paperwork with my medical information.

26. As I have indicated, I believed that I was offered a teaching position. I was concerned, however, and began to feel quite uncomfortable and upset during this interview. I felt that if I raised these issues, that Defendant Malagrifa and Defendant Lazaris would use this to deny me the position. This feeling grew during the course of the interview. The interview itself began to feel improper. I was becoming very upset and trying my best to maintain control. I wanted to excuse myself, but I felt that if I did, my job, or what I thought was my job, would be taken away. I also had a real sense that I was physically confined, that Defendant Lazaris and Defendant Malagrifa where using my personal file including my medical records to

intimidate me. The office was very small and I felt hemmed in between Defendant Malagrifa and Defendant Lazaris. In addition, Defendant Malagrifa closed the door but not until the meeting had progressed. They were questioning my integrity, and if I left my reputation would have been damaged. It was at the end of this interview that I started to think that I had been mislead. I also felt, given Defendant Lazaris' conduct at this interview, that she was somehow involved in what appeared to be a decision not to hire me.

27. The entire process was very stressful and odd; I had very strange feelings regarding their conduct during this interview. In one of my depositions, I told one of the attorneys that I felt like the little lamb at slaughter. At this point, Defendant Malagrifa told me that he had a number of applications for this job. He showed me a large stack of envelopes and I believe he said there were twenty applications for the position. During the interview, Defendant Malagrifa explained that Defendant Lazaris' presence by noting that she was going to be a teacher liaison next year. This interview was traumatizing to me. It was very upsetting.

28. When I came home after the interview, I told my husband what happened. Defendant Malagrifa also insinuated that I had taken school money. Also spoke with Mrs. Ryan regarding this incident. I was very upset and concerned when he asked me where the money went. I didn't understand that question. I also didn't understand why he would ask me why all the kids left the program. It was as if he was suggesting that I was the cause of it. I also had a conversation with Joe Gauvain regarding the incident. Mr. Gauvain asked me what happened. Then he said that he thought I had the job. And I said, I did, too. I was never told that I had a legal right to file a grievance. The only direction I received from Mr. Gauvain was that I should speak with Mr. Malagrifa. As to my Union status, at the time I did not really understand what my rights were as a union member. I did have a union card and was paying dues.

29. In September, I had a meeting with Dr. Leonard regarding these issues. It is my recollection that we had a very long discussion and that we discussed most if not all of the facts raised in this

Affidavit. As I understand it, Dr. Leonard does not recall this meeting. Dr. Leonard told me he saw nothing wrong with what happened and he suggested that I speak with Defendant Malagrifa.

30. I learned from a friend, Mrs. Cole, the wife of Dr. Fred Cole that someone else had been hired for the job. I don't recall if Mrs. Cole told me that the person hired was Defendant LeBrun. She may have. Mrs. Cole did indicate that a postal worker was hired. I was asked whether, as a result of this incident, I sought medical treatment or counseling. I did not do this. I was concerned that if I applied for another job, this would be in my file.

31. During a number of conversations, which I recount in my depositions and which I cannot recall the details of at this moment, Defendant Lazaris suggested that her job was worth some money. In my view, she was insinuating that she could get me the job, or stop me from being hired for a fee or favors. Once I declined and walked away. She never asked me for another thing

The statements in this Affidavit are true to the best of my knowledge and recollection and I signed this Affidavit under the penalties of perjury this day, May 3, 2005,

/s/_____
Donna Linda Saxonis

STATE OF MASSACHUSETTS)
) ss.
COUNTY OF ESSEX)

Personally appeared Donna Linda Saxonis on March 7, 2002, and acknowledged the foregoing instrument to be his free act and deed, before me,

/s/
Jacqueline D. Bergeron
My Commission expires:
November 21, 2008

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.
SUPERIOR COURT

C.A. No.
00-1367 C

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DONNA SAXONIS *
PAUL SAXONIS *
*
Plaintiffs *
*
*
*
V. *
*
THE CITY OF LYNN, ET AL *
*
Defendants *
*
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BRIEF OF THE DEFENDANTS', THE LYNN TEACHERS UNION LOCAL 1037, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND JOSEPH G. GAUVAIN, PRESIDENT OF THE LYNN TEACHERS UNION SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

PRELIMINARY STATEMENT

The Plaintiffs, who are husband and wife, have filed a sixty age complaint containing twenty-one counts against The Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO ,(hereinafter The Lynn Teachers Union) and Joseph G. Gauvain, President of Lynn Teachers Union, (hereinafter Gauvain) and twenty-six other Defendants. (See Complaint and Jury Claim attached as Exhibit "1"). These actions allegedly arise from the failure of the Lynn School Department to hire Donna Saxonis as a cosmetology Teacher.

FACTS

A. The Plaintiff Donna Saxonis sought a position as a full time cosmetology teacher at Lynn Vocational Technical Institute .
B. The Plaintiff Donna Saxonis was not hired as a full time cosmetology teacher to Lynn Vocational Technical Institute by the Lynn School Department.
C. There was no employment contract between the Plaintiff Donna Saxonis and The Lynn Teachers Union and Gauvain.

ARGUMENT

The moving party may demonstrate, by reference to materials described in Mass. R. Civ. P.56( ), that the plaintiff's evidence is sufficient as a matter of law to establish an essential element of his claim or that the plaintiff "has no reasonable expectation of proving an essential element of his case." Brunner v. Stone & Webster Engineering Corp., 413 Mass. 698, 705 (1992); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-16 (1991).

Motion for Summary Judgement "A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial, and mandates summary Judgement in favor of the moving party. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-16 (1991).

The Plaintiff, Paul Saxonis, admits in his deposition that nineteen of the twenty-one counts do not apply as to him against The Lynn Teachers and Gauvain. (See Deposition of Paul Saxonis, page 9, lines 6-23 and page 10 lines 1-6 attached as Exhibit 2).

He does however, in Count seven, allege Reckless and Intentional Infliction of Emotional Distress which is defined as follows:

"One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to

liability for such emotional distress, and if bodily harm results from it, for such bodily harm." Restatement (Second) of Torts sec. 46.

Further, since the Plaintiff Paul Saxonis is a bystander he would have to show that Lynn Teachers and Gauvain intentionally or recklessly caused severe emotional distress, in his presence.

When he was asked at his deposition what was the basis for ringing a claim for reckless and intentional inflection of motional distress, Paul Saxonis replied: "Mr. Gauvain refused to represent my wife who was a union member." (See Deposition of Paul Saxonis page 10, line 21, attached as Exhibit "3") .

"Liability cannot be predicated upon "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," nor even is it enough "that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages or another tort"; rather, " (1) liability has been found only where he conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 comment d (1965). Foley v. Polaroid, 400 Mass. 82, (1987).

The conduct described above does not meet that standard.

Count VII does not appear to apply to the Plaintiff Donna Saxonis and should therefore be dismissed under Mass R. Civ. P. 56. A similar analysis of Reckless and Intentional and Inflection of emotional Distress may be applied to Count VI brought by the Plaintiff Donna Saxonis against The Lynn Teachers Union and Gauvain.

There were no facts submitted by the Plaintiffs against the Defendants The Lynn Teachers Union and Gauvain which would meet the "outrageous" requirement of Intentional Infliction of motional Distress.

With respect to Count I Breach of Employment contract and Count II Wrongful/Unlawful Termination, the Plaintiff Donna Saxonis was applying for a position as a Cosmetology teacher at Lynn Vocational Technical Institute which is operated by the City of Lynn through the Lynn School Committee. It is uncontroverted hat the Lynn Teachers Union and Gauvain have no legal authority to hire or terminate a cosmetology teacher at Lynn Vocational Technical Institute in Lynn.

Since there was no contract to hire the Plaintiff Donna Saxonis by the Defendants. The Lynn Teachers Union and Gauvain, then there could be no breach of contract or wrongful termination by The Lynn Teachers Union and Gauvain.

Similarly, with respect to Count III Wrongful Termination and Civil Conspiracy, The Plaintiff Donna Saxonis was not an employee of The Lynn Teachers Union and Gauvain so, consequently, they could not terminate her employment; nor did they have any authority to employ or terminate employment for the Lynn School Department even if Donna Saxonis had been hired by the Lynn School Department.

As to the Civil Conspiracy aspect of this Count, neither Plaintiff adduced any material facts against The Lynn Teachers and Gauvain that would support a claim for conspiracy.

As regards to Plaintiff, Donna Saxonis, she was asked the following question concerning Count 16 - False Imprisonment:

> "Q. What role did Mr. Gauvain or the Lynn Teachers Union play in that false imprisonment that you allege? A. I don't believe any. It was the people ---." (See the Deposition of Donna Saxonis, page 186 lines 9-11, attached as exhibit "4").

She was asked further if that applied to Counts 9 -15 and she replied yes. (See Deposition of Donna Saxonis page 186, lines 12-19, attached as Exhibit 5). Count 9 is a count concerning Defamation and as indicated above the Plaintiff Donna Saxonis said it did not apply to The Lynn Teachers Union Local 1037, American

Federation of Teachers, AFL-CIO, and Joseph G. Gauvain, President of The Lynn Teachers Union, but rather cites a discussion between two other Defendants.

As to Count IV, Intentional Interference with Advantageous ,Economic and or Contractual Relations the Plaintiff Donna Saxonis must show that she had an existing contract with another person or entity, which She was unable to do during discovery. Further, she must show that The Lynn Teachers Union and Gauvain had knowledge of the contract. There was no written contract or offer of employment produced during discovery.

Finally and most important, in order to recover damages for this count the Plaintiff must prove that the defendant intentionally interfered with the existing Contract. Again there were no material facts produced which would suggest that The Lynn teachers Union and Gauvain interfered with a contractual or advantageous relationship between the Plaintiff and the Lynn School Department or anyone else.

To the contrary, at her deposition Donna Saxonis testified that she never asked The Lynn Teachers Union and Gauvain to file a grievance on her behalf.

Q. Did you, in fact, file a grievance after the appointment of Ms. LeBrun?
A. No.
Q. At any point since 1997?
A. No. (See Deposition of Donna Saxonis page 164, lines 8-12, attached as Exhibit "5").

This failure to request that a grievance be filed is Supported by Paul Saxonis who testified at his deposition as:

Q. Did you file a grievance on behalf of your wife?
A. No.
Q. Did your wife file a grievance, if you know?
A. No. (See Deposition of Paul Saxonis page 40, lines 11-14, attached as Exhibit "6") .

With respect to Count V, Fraud/Deceit, Donna Saxonis must show that The Lynn Teachers Union and Gauvain made a misrepresentation of a material fact. When asked about the nature of the Fraud/Deceit Claim against The Lynn Teachers Union and Gauvain at her deposition Donna Saxonis stated "I don't think he (Mr. Gauvain) made a diligent inquiry." (See Deposition of Donna Saxonis page 190, line 19, Exhibit "7") .

In order to successfully bring a claim for Fraud/Deceit one must allege and prove that The Lynn Teachers Union and Gauvain made a false statement for the purpose of inducing the Plaintiff to act. Steele v. Webster, 188 Mass 478 (1905). In this case I Donna Saxonis testified that she only had one conversation with The Lynn Teachers Union and Gauvain which went as follows:

> "When I found out that I did not get the job, I called by husband and I told him I didn't get the job, and I was hysterical.
>
> He came right home from, work, and he called Mr. Gauvain, and my husband said, this is Paul Saxonis, 1Ii; and I'm calling on behalf of my wife, and I don't remember what he said, and my husband passed the phone to me over the ironing board.
>
> The first words Mr. Gauvain ever said to me in my whole life was, Donna, what happened. I thought you got that job. And I said, I did, too. And I said, I don't know what to do, and I passed the phone back to him." (See Deposition of Donna Saxonis page 161 lines 2-14 Exhibit "8") .

This conversation took place after the Lynn School Department decided not to hire Donna Saxonis and there is no of misrepresentation or reliance by Donna Saxonis on by The Lynn Teachers Union and Gauvain to her detriment.

Finally, since all of the counts in the complaint by Donna Saxonis against the Lynn Teachers Union and Gauvain must be dismissed pursuant to Rule 56 for the foregoing reasons then Count

21 Loss of Consortium alleged by Paul Saxonis must also be dismissed.

Standard of Review

Summary judgement is properly entered where the leadings, answers to interrogatories, and depositions show the fact and that the moving party as a matter of law. Mass. R. Civ. P.56. here are two ways that a party moving for summary judgement satisfies its burden of showing the absence of a material issue f fact. First, it may affirmatively present a set of undisputed judgment as a matter of law. Second, he moving party may demonstrate, by reference to materials described in Rule 56 ( ) ,that the Plaintiff's evidence is insufficient as a matter of law to establish an essential element of his claim or that the Plaintiff "has no reasonable expectation of proving an essential element of his case." Brunner v. Stone & Webster Engineering Corp., 413 Mass.
698, 705 (1992) ; Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-16 (1991).
I

If the moving party sustains its burden, the opposing party may not rest on the pleadings, but must allege specific facts establishing a triable issue to avoid entry of summary judgement. Mass. R. Civ. P. 56©; Kourouvacilis v. General Motors Corp., supra at 716; Baldwin v Mortimer, 403 Mass. 142, 144 (1988

CONCLUSION

For the foregoing reasons, Defendants, The Lynn Teach Union and Gauvain respectfully request that Summary Judgement Dismissal enter on their behalf.

The Lynn Teachers Union 1037, American Federation Teachers, AFL-CIO, and G. Gauvain, President of The Lynn Teachers Union By their attorney,

s/_____

James J. Carrigan
LAW OFFICES OF JAMES J. CARRIGAN
P.O. Box 2163
Lynn, MA 01903
(781) 596-0100

(3)

No. 04-1596

Supreme Court, U.S.
FILED
JUN 30 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONNA SAXONIS,

Petitioner,

v.

CITY OF LYNN, MASSACHUSETTS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES J. CARRIGAN
Counsel of Record
15 Johnson Street
P.O. Box 2163
Lynn, MA 01903
(781) 596-0100

June 30, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
FACTS	1
REASONS FOR DENYING THE PETITION	3
SUMMARY	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Aetna Casualty Surety Company v. P&B Autobody, et al., 43 F. 3d 1546 (1994) 11

Baker v. Local 2977, State Council 93, American Federation of State, County and Municipal Employees, et al., 25 Mass. App. Ct. 439 (1987) 8

Cappellano v. Massachusetts Bay Transp. Auth., 38 Mass. App. Ct. 231 (1995) 10

Carbone v. School Comm. Of Medford, 12 Mass. App. Ct. 948 (1981) 8

Celotex Corp. v. Catrett, Administratrix of the Estate of Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 4

Community National Bank v. Dawes, 369 Mass. 550 (1956) 4

Davidson v. Commonwealth, ___ Mass. App. Ct. 541 (1979) 4

DeArroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F. 2d 281 (1st Cir. 1970) 9, 13

John F. Fleming v. Ernest B. Dane & others, 304 Mass. 46 (1939) 11

Graham v. Quincy Food Serv., Employees Assn. & Hosp., Library & Pub. Employees Union, 407 Mass. 601 (1990) 10

Harrison v. United States Transportation Union, 530 F. 2d 558 (4th Cir. 1975) 7, 8

Leahy v. Local 1526, American Federation of State County and Municipal Employees, et al., 399 Mass. 341 (1987) 6, 7, 8

TABLE OF AUTHORITIES – Continued

Page

Milford Power Limited Partnership, by its General Partner Milford Power Associates, Inc. Plaintiff and Defendant-in-Counterclaim, v. New England Power Company, Defendant and Plaintiff-in-Counterclaim, v. Enron Corp., Enron Power Marketing, Inc., Jones Capital Corp., and Jones Medway, Inc., Additional Defendants-in-Counterclaim, 918 F. Supp. 471 (1996) 12

National Assn. of Govt. Employees v. Labor Relations Commn., 38 Mass. App. Ct. 611 (1995) 10

STATUTE

Mass. R. Civ. P. 56(e) 3

RULE

Rule 56 4

BRIEF IN OPPOSITION

The Lynn Teachers' Union and Joseph Gauvain former president of the Lynn Teachers Union, respectfully ask this Court to deny the petition seeking review of the judgment of the Supreme Judicial Court of Massachusetts.

OPINIONS BELOW

The judgment of the Massachusetts Supreme Judicial Court officially reported at 443 Mass. 1104, 822 N.E. 2d 304 (2004), and is reprinted in the Appendix at AP. 29. The opinion of the Massachusetts Appeals Court is reported at 62 Mass. App. Ct. 916, 817 N.E. 2d 793 (2004), and is reprinted in the Appendix at AP. 23.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on February 2, 2005. The jurisdiction of this Court is invoked under 28 USC §1257.

1. The Massachusetts Supreme Judicial Court denied further appellate review without a written opinion. See 5443 Mass. 1104, 822 N.E. 2d 304 (2004).

FACTS

Petitioner was a substitute cosmetology teacher at the Lynn Vocational Technical Institute during the 1996-1997 academic year. She was expecting to be hired as a fulltime teacher for the following year by the hiring authority

Principal Al Malagrifa. In August, 1997, she learned from Mr. Malagrifa that she was not going to be hired as a cosmetology teacher for the following year. At that time, she was not an employee of the Lynn School Department, nor a member of the Lynn Teachers' Union.

Consequently, in 2000, Petitioner and her husband filed a complaint containing twenty-one counts against Joseph G. Gauvain former President of the Lynn Teachers' Union Local 1037 (hereinafter "Gauvain") and The Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO (hereinafter the "Union") and twenty-six other Defendants.

Upon completion of discovery,[1] Gauvain and the Union filed a Motion for Summary Judgment under MRCP 56. Petitioner and her husband had been pro se. However, their counsel of record in the instant case also represented them at the hearing in Superior Court on the Motion for Summary Judgment. The Motion by Gauvain and the Union moved for summary judgment of dismissal and alleged that there were no genuine issues of material fact in dispute as to **all** (emphasis supplied) of the counts against them.

---

[1] On page four of her petition Petitioner states that her husband did not seek written discovery but conducted a number of depositions. That is not so. Interrogatories and Requests for Production of Documents were served on the Respondent and answered timely by the Respondent.

MOTION FOR SUMMARY JUDGMENT ALLOWED AND MOTION FOR RECONSIDERATION WAS DENIED.

The Motion for Summary Judgment was allowed by the Superior Court Judge. Counsel for Petitioner filed a Motion for Reconsideration which was denied by the same judge.

MASSACHUSETTS APPEALS COURT AFFIRMS DECISION OF SUPERIOR COURT

Petitioner appealed to the Massachusetts Appeals Court but that Court affirmed the decision of the Superior Court.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DENIES APPLICATION FOR FURTHER APPELLATE REVIEW

On February 2, 2005, the Massachusetts Supreme Judicial Court denied Petitioner's application for further appellate review.

REASONS FOR DENYING THE PETITION

SUMMARY JUDGMENT STANDARD

This Court has acknowledged the longstanding principle enunciated in federal and states cases that summary judgment will issue if there are no genuine triable issues in dispute.

When a party proceeding under Rule 56(b) has established by credible evidence that there is no issue of material fact, the opposing party cannot rest on the applicable proceedings but must "allege specific facts which establish

that there is genuine, triable issue or summary judgment . . . will be entered against him." Mass. R. Civ. P. 56(e). *Davidson v. Commonwealth*, ___ Mass. App. Ct. 541, 551 (1979).

Petitioner argues that she should be entitled to a jury trial but that would undermine the traditional authority of trial judges to grant summary judgment in meritless cases. This Court said: "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses and we think it should be interpreted in a way that allows it to accomplish this purpose." See *Celotex Corp. v. Catrett, Administratrix of the Estate of Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986).

The Petitioner cites this case on page thirteen of her petition when she claims that, "no court should issue summary judgment sua sponte without notice to the parties to bring forth evidence." What the Court actually said was: "Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence." As indicated above, the Petitioner was represented by Counsel on the Motion for Summary Judgment. The opposing party will not successfully avoid summary judgment if he merely raises vague and general allegations of expected proof. *Community National Bank v. Dawes*, 369 Mass. 550, 371 (1956).

In the instant case, the Petitioner limits her claim to the allegations set forth in the first three Counts of her Complaint against Gauvain and the Union.

DUE PROCESS

The Petitioner seems to think the Massachusetts Appeals Court denied her due process by raising a statute of limitations issue for the first time. The Petitioner states on page thirteen of the petition: "How then, under basic notions of due process, could the Appeals Court sit de novo on the limitations issue when the complete facts on this issue were not before the trial court." What the Appeals Court actually said with respect to the claim that the Union breached the duty of fair representation was " . . . [petitioner's] other allegations against the Union are untimely and conclusory." It said nothing about a statute of limitations.

The Appeals Court had been advised by Respondent that Article XI(B)(1)(a) of the collective bargaining agreement between the Union and the Lynn School Department required a timely filing of a grievance. It states: "an employee may present a grievance to the principal of the school within fifteen (15) days following knowledge by the grievant of the act or condition which is the basis of the complaint, unless the grievant has a valid excuse for later filing." In addition, the Massachusetts Appeals Court issued judgment on the claim that the Union breached a duty of fair representation when it said "(even if she was a member of the bargaining unit) because [petitioner] has demonstrated no reasonable expectation of proving that the Union's conduct was arbitrary."

JUSTICIABLE CLAIM?

The Petitioner states on page twelve of her petition that the Appeals Court held that the Petitioner was

entitled to pursue at least part of her claim against the school system. The Petitioner then states: Thus, the Appeals Court concluded the grievance at issue was justiciable. To the contrary, the Appeals Court affirmed judgment as to all counts with the exception of Count I relating to detrimental reliance and amounts owed for work performed during the 1996-1997 school year. This portion of Count I relates, not to Gauvain or the Union, but to the principal's alleged promises to hire Petitioner as a permanent substitute and as replacement for a retiring teacher. This detrimental reliance was not the subject of a grievance. It is uncontroverted that neither Gauvain nor the Union had authority to hire or terminate Petitioner or anyone else who worked for the Lynn School Department.

DUTY OF FAIR REPRESENTATION

The basis of Petitioner's claim appears to be the allegation that Gauvain and the Union breached a duty of fair representation to the Petitioner. This allegation flows from two sets of circumstances.

1. Petitioner was a temporary substitute teacher who was not retained as a long term substitute teacher, and

2. Petitioner was not hired as a full time teacher in August 1997.

Petitioner argues that even if the Massachusetts statute "did not provide for the duty of fair representation, the court would infer it as a constitutional requirement." She cites *Leahy v. Local 1526, American Federation of State County and Municipal Employees, et al.*, 399 Mass. 341, 348 (1987), to support this view. In the *Leahy* case, the

plaintiff had requested the Union to file a grievance. The Union filed the grievance on the employee's behalf and processed the grievance through the first three steps of the grievance. The Union, however, failed to file a request for arbitration timely, and this was the basis of the Union's liability for its breach of fair representation.

Unlike the *Leahy* case, the Petitioner was not an employee or a member of the Union when the event which allegedly occurred in 1997 took placed. In her decision allowing the Motion for Summary Judgment for Gauvain and the Union, the trial judge pointed out "Since [petitioner] was neither a party to an employment contract with the Lynn School Committee at that time nor even an at-will employee, the Union and Gauvain cannot be charged with breach of the Union contract with the Lynn School Committee." See Petition pp. 8 and 9. Most important, unlike the *Leahy* case, *the Petitioner never asked Gauvain or the Union to file a grievance.*

Similarly, Petitioner cites *Harrison v. United States Transportation Union*, 530 F. 2d 558, 566 (4th Cir. 1975) to indicate that proof of a grievance's merit is circumstantial evidence that the failure to process the claim constituted bad faith. In that case, Harrison was in fact an employee and he had requested that a grievance be filed on his behalf. Although the Union filed the grievance on Harrison's behalf, they abandoned his grievance so that another employee might be reinstated. It was the failure to process Harrison's grievance that constituted bad faith.

Harrison is contrasted to the case at bar where there was no request of Gauvain or the Union to file a grievance nor was there any evidence of bad faith shown against Gauvain or the Union.

Likewise, Petitioner cites *Baker v. Local 2977, State Council 93, American Federation of State, County and Municipal Employees, et al.*, 25 Mass. App. Ct. 439, 442 n. 14 (1987), citing *Carbone v. School Comm. Of Medford*, 12 Mass. App. Ct. 948 (1981), to suggest when discrimination is involved, a union's alleged good faith will not suffice to insulate it from the process of law. Where is there evidence of discrimination in the case at bar?

In the *Baker* case, like *Leahy* and *Harrison* above, Baker was in fact a long time employee and he had requested the union to file a grievance which the union pursued to the third stage. However, despite Baker's request to pursue arbitration, the union refused to do so. Despite its refusal to pursue arbitration, the Court held that the union did not breach its duty of fair representation. In support of its position regarding a union's responsibility the Court quoted the Massachusetts Labor Commission as follows: "Because bargaining ... agents' obligations often require that they represent conflicting interests, the National Labor Relations Board and the courts allow them a wide range of reasonableness in fulfilling their statutory duties, subject to good faith and honesty in the exercise of their discretion.... Consequently, an aggrieved employee, notwithstanding the possible merits of his claim, is subject to a union's discretionary power to pursue, settle, or abandon a grievance, so long as its conduct is not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect." ... Under such a canon, it is not enough for the employee ... to show that his grievance was "meritorious," ... or that the union made a "judgmental error", [sic] ... or employed reasoning which, as an original matter, would not satisfy an expert Labor Relations Commission ... or, by extension, a judge. That a

union did not reach the correct interpretation of a collective agreement . . . – was "inartful, unskillful, or erroneous" in contract analysis . . . – would not endow the grieving employee . . . with a right to correction at the hands of a court. The distinction often to be observed is "between honest, mistaken conduct, . . . on the one hand, and deliberate and severely hostile and irrational treatment on the other."

Petitioner also cites *DeArroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F. 2d 281 (1st Cir. 1970), for a breach of duty of fair representation in Union's failure to discern an obvious basis under the contract for pressing claims. This case is about seven telephone operators who were wrongfully discharged by their employer and whose union dismissed their grievances. The Court concluded that the union's failure to press plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them and this is a breach of its duty of fair representation preventing an exhaustion of contractual remedies and enabling these . . . plaintiffs to maintain their suit against the company.

Once again, this case can be distinguished from the case at bar because these plaintiffs were actual employees of a company who had requested their union to file a grievance. Further, in the *DeArroyo* case only the union could bring a grievance, whereas in the case at bar, the Petitioner, even though she didn't ask the Union to file a grievance, could have filed a grievance on her own behalf.

As regards the alleged breach of duty of representation, the Massachusetts Appeals Court said: "[Petitioner's] claim that the union breached the duty of fair representation in refusing to pursue her complaint of not being

named Lazaris's successor fails (even if she was a member of the bargaining unit) because she has demonstrated no reasonable expectation of proving that the union's conduct was "arbitrary, discriminatory, or in bad faith" or "perfunctory or demonstrative of inexcusable neglect," *Graham v. Quincy Food Serv., Employees Assn. & Hosp., Library & Pub. Employees Union*, 407 Mass. 601, 606 (1990) (citations omitted) as contrasted with a reasonable, good faith assessment that her grievances lacked merit. See id. at 609. See also *Cappellano v. Massachusetts Bay Transp. Auth.*, 38 Mass. App. Ct. 231, 235 (1995). Cf. *National Assn. of Govt. Employees v. Labor Relations Commn.*, 38 Mass. App. Ct. 611, 613 (1995), in which the plaintiff was simply ignored"

CONSPIRACY

Petitioner states in her petition that her petition limits her focus to Counts I through III, Petitioner states in footnote 3 on page four of her petition: "Count III states a claim for conspiracy. The only direct evidence relates to the letter documenting a meeting between these parties where the issue of termination of a substitute to impair seniority rights was raised. While Petitioners do not expressly waive this issue, argument is confined to Counts I and II."

The so-called direct evidence described in the footnote is merely a letter from Gauvain to the school principal summarizing a meeting between them which requests a confirmation or clarification from the school principal about the use of day-to-day substitutes and the removal of long term substitutes from assignments at LVTI, see AP.

114. This hardly rises to the level of evidence required to constitute a conspiracy.

As the Respondents indicated in their Motion for Summary Judgment, the Petitioner had not adduced any material facts against them that would support a claim for conspiracy against the Union or Gauvain. Nor did the Petitioner set forth any facts in the Statement of Facts in her brief submitted to the Massachusetts Appeals Court which would support a claim for Conspiracy against the Union or Gauvain. Although Petitioner's counsel indicated on page eight of that brief [Petitioner's] that alleged "destruction of [petitioner's] seniority . . . is not merely documented by Ms. Whyte's Affidavit . . . "

This Affidavit of Ms. Whyte, the Department Head, which was produced on the day of the hearing on the Motion for Summary Judgment does not mention Gauvain or the Union in any one of the twenty-one paragraphs contained in her affidavit.

In order to establish a claim for civil conspiracy, the Petitioner must show that there was a common design or an agreement, . . . between two or more persons to do a wrongful act and there must be proof of the same tortious act in furtherance of the agreement. *Aetna Casualty Surety Company v. P&B Autobody, et al.*, 43 F. 3d 1546 (1994).

Similarly, in *John F. Fleming v. Ernest B. Dane & others*, 304 Mass. 46, 49 (1939), the Court stated that the coercive power resided in only two individuals and that power consisted in nothing more than the power to make decisions as to foreclosures by a bank. Neither Gauvain nor the Union had any coercive power over the Petitioner as stated above. They neither had the authority to hire or

terminate the Petitioner nor did the Petitioner ever request them to file a grievance of her behalf.

With respect to this claim for conspiracy, the Massachusetts Appeals Court said: "Count III (Civil Conspiracy and wrongful termination): [Petitioner's] bare and conclusory allegations of a grandiose plot and cover-up to prevent her hiring cannot survive summary judgment. [Petitioner] has failed to show a reasonable expectation of proving that any defendants acted in concert to unlawfully deprive her of employment."

Further, the United States District Court for the District of Massachusetts stated: Under Massachusetts law, civil conspiracy is a "very limited cause of action." (Emphasis provided). In order to state such a claim, plaintiff must allege that defendants had some "peculiar power of coercion" over the plaintiff that they would not have had if they had been acting independently. Evidence of mere joint tortious activity by the defendants is insufficient to prove civil conspiracy. See *Milford Power Limited Partnership, by its General Partner Milford Power Associates, Inc. Plaintiff and Defendant-in-Counterclaim, v. New England Power Company, Defendant and Plaintiff-in-Counterclaim, v. Enron Corp., Enron Power Marketing, Inc., Jones Capital Corp., and Jones Medway, Inc., Additional Defendants-in-Counterclaim*, 918 F. Supp. 471 (1996). In the case at bar, there was not even evidence of joint tortious activity.

SUMMARY

In summary, the Petitioner never requested Gauvain or the Union to file a grievance on her behalf; although,

unlike the plaintiffs in the *DeArroyo* case, she could have filed a grievance on her own but she failed to do so. It is uncontroverted that neither Gauvain nor the Union had authority to hire or terminate Petitioner's employment with the Lynn School Department. Since there was no request for a grievance and, no evidence of discrimination or bad faith by Gauvain or the Union the claim of breach of duty of fair representation should fail. Finally, as the Appeals Court said: "[Petitioner] has failed to show a reasonable expectation of proving that any defendants acted in concert to unlawfully deprive her of employment."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES J. CARRIGAN, ESQUIRE
BBO #075720
15 Johnson Street
P.O. Box 2163
Lynn, MA 01903
1-781-596-0100

Counsel for Respondent